



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. OLE KANTAL, JJA

CIVIL APPEAL NO. 27 OF 2016

BETWEEN

SAMUEL NGUNJIRI MUTHUMA.....APPELLANT

AND

PETER KIBUI NYUGUTO.....1ST RESPONDENT

JOHN MWAURA WAWERU.....2ND RESPONDENT

(Being an appeal from the Ruling /Order of the Environment & Land

Court of Kenya at Nyeri (Waithaka, J.) dated 23rd March, 2015

in

E. L. C. No. 95 of 2010)

JUDGMENT OF THE COURT

1. **Samuel Ngunjiri Muthuma**, the appellant herein, lodged this second appeal in this Court on 9th May 2016 against **Peter Kibui Nyuguto** and **John Mwaura Waweru**, the 1st and 2nd respondents respectively. The appellant's first appeal to the High Court (being appeal No. 118 of 2014) against the said respondents was dismissed in a decision dated 23rd March 2015 which has provoked this second appeal.

2. The background leading to the first and second appeal shows that the appellant was a judgment debtor in **Nyeri CMCC No. 612 of 2007**. At the time judgment and decree was passed against him in the Chief Magistrate Court, he was the registered proprietor of the land known as **Muhito/Gaturia/294** (which is hereinafter referred to as "the suit land").

3. To recover the decretal dues amounting to Kshs 61,730/= the decree holder, the 1st respondent, applied for attachment of the suit land which was eventually sold in a public auction. The decretal sum was recovered and a surplus of sale proceeds amounting to Kshs 827,317/= payable to the appellant was realized. The record shows that a court order dated 13th November 2013 confirmed the sale and issued a

certificate of sale.

4. In an apparent attempt to retrieve the suit land, the appellant moved the Chief Magistrate's court in an application dated 24th July 2014 seeking to set aside the sale, but it was dismissed with costs on 4th September 2014. The grounds proffered in support of the dismissed application included the averment that the suit land was part of the estate of Ngima Muthuma who died on 12th July 1975 aged 75 years and in respect of whose estate the appellant was granted Letters of Administration Ad Litem on 15th July 2014 in High Court Succession No. 605 of 2014.

5. The record of appeal shows that a certificate of official search for the suit land (Muhito/Gaturia/294) was issued on 5th June 2014. It shows that the suit land was registered in the name of the appellant on 19th July 2007 and that the appellant had on that date been issued with a Title Deed.

6. The suit land was purchased in the auction by John Mwaura, the 2nd respondent, who became the registered proprietor on 25th July 2014. He was issued with a Title Deed on 31st July 2014.

7. Undeterred in his quest to retrieve the suit land, the appellant filed appeal in the High Court against the order of the Chief Magistrate dismissing his application to set aside the sale. He also included a prayer for stay of the dismissal order.

8. In the decision contained in the Ruling dated 23rd March 2015, the High Court at Nyeri (**L. N. Waithaka, J.**) dismissed both the application for setting aside and the appeal as lacking in merit. She upheld the decision of the Chief Magistrate in which the appellant's application dated 24th July 2014 was found to be incompetent because the appellant's advocates were not properly on record. It is from that decision that the appellant brings this appeal.

9. In the **Memorandum of Appeal** dated 29th April 2016, the appellant in the three grounds of appeal proffered, faults the learned Judge and contends that she erred in fact and law in holding that the appellant's advocate (Peter Muthoni) was not properly on record; that the learned Judge erred in finding the appellant's motion dated 26th September 2014 incompetent despite the suit land having been wrongly and illegally sold when it was part of the estate of Ngima Muthuma.

10. When the appeal came up for hearing, **Mr. Peter Muthoni**, learned counsel for the appellant appeared as did also **Mr. Waweru Macharia**, learned counsel for the 1st respondent and **Mr. Kimunya**, learned counsel for the 2nd respondent.

11. The appellant had filed written submissions on 20th February 2017 and the 1st respondent had filed written submissions on 8th June 2017 and a List of Authorities on 24th May 2017. The 2nd respondent filed written submissions on 11th June 2017.

12. Mr. Peter Muthoni urged the Court to allow the appeal, vacate the impugned ruling and set aside the order of 23rd March 2015 and substitute therefor with an order that Peter Muthoni was validly and properly on record and allow the application dated 26th September 2014 by setting aside the sale of the suit land and ordering refund of the purchase price money paid by the 2nd respondent within a reasonable time.

13. Mr. Waweru Macharia on behalf of the 1st respondent contended that as this is a second appeal, and as the trial court (Chief Magistrate in Suit No. 612/2007) had already made a finding on facts to the effect that Peter Muthoni was not properly on record and as that finding had been confirmed by the first appellate court in appeal No. 118 of 2014 in the High Court, it was not open to this Court to interfere with that finding of fact. Consequently, counsel contended that the appeal does not have a leg to stand on and must be dismissed. Counsel referred to us the authorities in his List of Authorities to buttress that proposition.

14. Learned counsel Mr. Kimunya associated himself with the submissions of Mr. Waweru Macharia. He added that no fraud had been shown in the sale of the suit land and that there was no evidence that the suit land was ever in the name of Ngima Muthuma. He urged us to dismiss the appeal as lacking in merit.

15. We have perused the record of appeal and the written submissions and have given due consideration to the rival submissions made by counsel on behalf of the parties. This being a second appeal, only issues of law fall for our determination. The facts relating to the sale of the suit land by public auction are not in controversy. Only two issues arise in this appeal; **first** is the issue whether the suit land was part of the estate of Ngima Muthuma or was the appellant's property. The certificate of official search referred to above shows that the suit land was registered in the appellant's name as the proprietor on 19th July 2007. There is not a shred of evidence to show that Ngima Muthuma had equitable or other interest in the suit land. The allegation that it was part of the estate of Ngima Muthuma was idle. The **second** issue relates to the legal representation of the appellant by Advocate Peter Muthoni. The learned Chief Magistrate made a finding that Peter Muthoni & Co Advocates were not properly on record and that the application by them was therefore incompetent. That was a finding of fact not law and the High Court as the first appellate court confirmed the finding. We see no basis for interfering with it. The appeal is clearly bereft of any merit. Without any disrespect to counsel, we see no need to delve into the case law but we commend counsel for the research conducted. We dismiss the appeal. However, we set aside the learned Judge's order on costs and direct that the advocate for the appellant shall not be personally liable to pay the costs of the appeal. The appellant as a party shall pay the costs of this appeal. It is so ordered.

Dated and delivered at Nairobi, this 20th day of December, 2017

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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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