IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 34 OF 2013

BETWEEN

NJERU NJAU alias KAMANGA.....APPELLANT

AND

MBURIA KUGEREKA.....1ST RESPONDENT

ELENEO MUCHIRA WAWIRA.....2ND RESPONDENT

AGNES NGENDO KARANJA.....3RD RESPONDENT

EDWARD MUGO MUNE.....4TH RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at

Embu (Okwengu, J.) dated 12th August, 2011

in

H. C. C. C. No. 19 of 2002)

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JUDGMENT OF THE COURT

Introduction

1. This appeal relates to an old land dispute which commenced about 40 years ago! For reasons that will become apparent shortly, we shall not delve into minute analysis of the facts and the law in the appeal. The appellant is **Njeru Njau** (Njeru) who was represented before us by learned counsel **Mr. P. N. Mugo**, while the 1st Respondent, **Mburia Kugereka** (Mburia) appeared in person. The two are the main protagonists in the dispute but the respondents 2, 3, and 4 were joined in as interested parties and we shall henceforth refer to them as such. They were represented before us by learned counsel **Mr. Ramadhan Abubakar**, from the firm of **M/s Magee Wa Magee & Co Advocates**.

2. The appeal arises from the decision of the High Court (**Okwengu J**) (as she then was) sitting in Embu,

made on 12th August 2011, declaring the suit filed by Njeru as incompetent on account of existence of an unchallenged judgment of Embu Senior Resident Magistrate (SRM) which was recorded on 13th September 2000, pursuant to an arbitration award (the award) filed on 28th July 2000. The view of the High Court was that Njeru's suit was *res judicata* because of that judgment, and dismissed it.

3. In nine grounds of his memorandum of appeal, Njeru argues, *inter alia,* that the High Court was in error because, for several reasons, the award which was made a judgment of the court by the SRM was a nullity *ab initio* and, in any event, the SRM had no jurisdiction to enter any judgment since the main suit had already been transferred to the High Court for hearing and determination.

The dispute.

4. A brief chronological narration of events is necessary for clearer understanding of this case. At the centre of the dispute is a parcel of land registered under the **Registered Land Act**, Cap 300 (now repealed) and known as **Gaturi/Githimu/593** measuring approximately 1.62 Hectares or 4 Acres (the disputed land). It is common ground that the original owner of the disputed land was Njeru who was registered in 1961. In 1973, he says he temporarily leased it to Mburia, but Mburia in turn says he bought the land from him that same year, and in 1985 registered a caution against the Title claiming a purchaser's interest. After some skirmishes before the local chief and District officer, Njeru went before Embu Resident Magistrate's court and filed **PMCC No. 4 of 1991** (case 4/91) claiming ownership of the land and an eviction order against Mburia. He also later filed **SRMCC 114 of 1997** seeking removal of the caution filed by Mburia.

5. There is no clarity on what became of case 4/91 soon after filing, but as noted by the High Court, it appears to have ended up before a panel of three elders for arbitration in 1994. Whether that panel was appointed under the **Land Disputes Tribunals Act** or under the arbitral procedures in **Order XLV** of the **Civil Procedure Rules** then in force, is not evident from the record. The panel of elders apparently did nothing to dispose of the matter soon after it was placed before them.

6. In November 1999, Njeru filed **Misc. Application No. 54 of 1999** seeking the transfer of case 4/91 to the High Court for hearing and disposal. However, the application was not heard until 5th July 2000 when Tuiyot J. granted the order. The order was filed and served on the Principal Magistrate, Embu on 6th July 2000.

7. Meanwhile, the panel of elders appears to have summoned Njeru and Mburia on 25th May 2000 to appear before it for hearing of the case. The panel, on the same day, pronounced a verdict declaring that Mburia had bought the disputed land and the Title should be transferred to him by Njeru failing which the court should sign the transfer forms. By a letter, curiously dated *4th May 2000*, the District Commissioner, Embu, forwarded the award dated 25th May 2000 to the Principal Magistrate and it was received on 26th July, 2000.

8. A different file, **SRMCC Award No. 2 of 2000**, appears to have been opened for the filing of the award, and Mburia applied on 28th July 2000 for the award to be made a judgment of the court. Despite Njeru's protests that the award was in respect of case 4/91 which had been transferred to the High Court before the award was filed, the SRM (S. Ombaye) went ahead and confirmed the award as a judgment of the court on 13th September, 2000.

9. A subsequent attempt by Njeru to have the judgment reviewed and the award set aside was similarly rejected by the same Magistrate on 17th January 2001, citing procedural defects. Mburia then had the land transferred to himself and he sub-divided it into 12 sub plots. He sold three of them to the interested parties and continued to occupy the rest. Njeru did not give up pursuing case 4/91 which seems to have been re-registered in the High Court as **HCCC No. 19 of 2002** with the original plaint dated 10th January 1991 having been amended, with leave, three times on 21st August 1997, 21st June 2002 and 15th July 2003 to plead further issues and enjoin the interested parties. It was the *'Further Amended Amended*

Plaint' that came before Okwengu J for hearing and was declared incompetent as earlier stated.

Submissions of the parties

10. Mr Mugo, for Njeru, was emphatic in urging the appeal, that the High Court erred in declaring the suit incompetent when it was raising jurisdictional issues which went to the core of fair administration of justice. He submitted that the Land Disputes Tribunal had no jurisdiction to adjudicate disputes relating to ownership of registered land and any such decision would be void; that even if it had the jurisdiction, the decision it purported to file in court was made more than six years since the case was referred to it and the award was therefore a nullity; that the SRM had no jurisdiction to record a judgment in a matter which had evidently been transferred to the High Court for hearing and determination; that the procedure of judicial review was not the only available avenue for challenging a decree which was a nullity; and that the High Court failed to appreciate that there was no evidence from Mburia to prove any sale agreement for the disputed land, or consent of the relevant Land Control Board, thus rendering the alleged sale void for all purposes. He concluded that Mburia had no interest in the land which he could transfer and therefore the interested parties have no valid Titles to the land.

11. Mburia, who appeared in person, supported the arbitration process and the finding that he bought the disputed land from Njeru and subsequently took possession of it. He has since developed it by planting coffee and constructing permanent buildings and has even buried some of his family members there. He has all along won every case filed by Njeru and will continue to do so. He confirmed that he subdivided the land after the judgment and sold some portions to the interested parties who are the rightful owners of the plots they bought.

12. For his part, Mr. Abubakar submitted that the interested parties were mere purchasers of part of the disputed land without notice of any defects in the Title of Mburia which was confirmed through an official search. He further supported the finding of the High Court that the order made by the SRM adopting the award as a judgment conferred legitimate rights to Mburia. In his view, it could only have been quashed through a judicial review application but none was made. It was also the view of counsel that it was not possible to reopen disputes which had been finally decided as the court of Appeal decided when rejecting an application to appeal to the Supreme Court in the case of **Charles Karathe Kiarie & 2 Others v. The Administrators of the Estate of John Wallace Mathare & 5 Others [2013] eKLR**. Finally he submitted that the interested parties were protected by the law as innocent purchasers for value as emphasized in the **Kiarie case (supra).**

Determination.

13. Ordinarily, on a first appeal, this Court would be obligated to analyze and re-evaluate the entire record and decision of the trial court by way of a rehearing and make its own conclusions in the matter. That much is clear from the decision of the predecessor of this court in ***Selle v. Associated Motor Boat Company [1968] E.A. 123*** at p.126 where it stated thus:

> ***"An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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 demeanor of a witness is inconsistent with the evidence in the case generally."***

14. We take the view, however, that the case before the trial court was not decided on merits but on the basis of the trial court's appreciation of the efficacy of the order made by the SRM on 13th September 2000, which, in the court's view rendered Njeru's suit *res judicata* and therefore incompetent. With respect, we do not share that view.

15. There is no denying, and there are documents to show for it, that Njeru filed case 4/91 before the Principal Magistrate's court in Embu. There is, however, no evidence, either from the court records or from the parties themselves, to show how the case ended up before an arbitration panel. There is also no evidence to ascertain whether that panel was the **Land Disputes Tribunal** which was in existence under the law at the time to adjudicate on specified disputes relating to land, or an ordinary arbitration panel, and in either case, the source of authority of that forum. Mburia himself did not even attend the hearing before the High Court, despite service of hearing notice, to explain any of these things.

18. More importantly, there is evidence which is not controverted, that case 4/91, was by an order of the High Court which has never been set aside, transferred to the High Court for hearing and disposal. This fact was indeed brought to the attention of the SRM who curtly ignored it before recording the judgment relied on by the trial court. The act of the SRM in ignoring an order of the High Court which was binding on it, warts and all, was to say the least rebellious. We find no difficulty in declaring that the SRM was acting without jurisdiction. Besides, the purported award ought to have been filed in case 4/91, if it had been legitimately referred to arbitration, but the SRM made orders in a different file (**SRMCC Award No. 2 of 2000)** which took no consideration of case 4/91.

17. As this Court has said times without number, jurisdiction is everything, and without it, a court acts in vain. The High Court had taken away the jurisdiction of the SRM in case 4/91 before any documents were filed in court in respect of that case. The SRM could not purport to validate the record, as is apparent, by making orders in a different file. The award intended to be filed in case 4/91 would, at best, have been evidential material in the High Court. Lord Denning, in his usual clarity and elegance described such orders in **Macfoy vs. United Africa Ltd (1961) 3 All F.R. 1169 at p. 1172:**

> ***"If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up 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 which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

See also the decision of the Supreme Court in **Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR**

18. The trial court could have regularized the record by declaring the actions of the SRM as null and void, but did not. It is necessary that we now do so. It follows that the judgment entered by the SRM as well as every proceeding that was founded on it were also incurably bad and of no legal effect. We so declare.

19. Finally, it seems to us that the trial court did not appreciate that the suit placed before it for hearing and determination was in fact case 4/91 which had apparently been re-registered as **HCCC 19 of 2002**, the pleadings of which had been variously amended over the years. The validity of the judgment entered by the SRM would have been germane to consider within that suit without the necessity of judicial review proceedings, and the contrary approach held by the trial court was, in our view, restrictive and erroneous.

20. For those reasons, we think the right approach was not given to the appellant's suit and the determination of it in summary manner was prejudicial. We allow the appeal and set aside the decision of the High Court in its entirety. We remit the suit back to the High Court in Embu for hearing and determination on merits.

21. In making that order, we are not blind to the lengthy period the dispute has taken in the corridors of justice and the respective advanced ages of the two protagonists. However, we shall not sacrifice the hallowed principles of fair hearing and dispensation of justice in accordance with the law, at the altar of expedition. We are also alive to the concerns of the interested parties whose rights are now in limbo. The consolation is that they still have the opportunity to restate their respective cases before another forum which will consider them on merits.

22. The costs of this appeal shall abide the outcome of the re- trial before the High Court.

Orders accordingly.

Dated and delivered at Nyeri this 20th day of May, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR