



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, AZANGALALA & SICHALE, J.J.A)

CIVIL APPEAL NO. 264 OF 2004

HOUSING FINANCE COMPANY OF KENYA LIMITED..... APPELLANT

AND

THE ATTORNEY GENERAL (REPRESENTING THE PRINCIPAL REGISTRAR OF

TITLES KENYA)..... 1ST RESPONDENT

NGETCO INVESTMENTS LIMITED 2ND RESPONDENT

(An Appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Kuloba, J) dated 30th July, 2003 in HC. MISC. NO. 1316 OF 1995)

JUDGMENT OF THE COURT

The appellant, **HOUSING FINANCE COMPANY OF KENYA**, the then applicant, in pursuance to leave granted on 21st November, 1995 filed a Notice of Motion application dated 11th December, 1995. The Motion was premised on O.LIII Rules 1, 2 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 63 of the Registration of Titles Act (RTA), Chapter 281 of the Laws of Kenya and under all inherent powers of the Court. In the Motion, the Principal Registrar of Titles, the 1st respondent herein, was named as the defendant. The appellant sought the following orders:-

- “1. That the registration by the Principal Registrar of Titles of the vesting order in Civil Case No. 687 of 1991 on the 19th day of December 1994 being entry number I.R. 12102/19 purporting to transfer the title of ALL THAT piece of land known as Land Reference Number 3734/496 (original Number 3734/5/291) (the said “property”) to NGETCO INVESTMENTS LIMITED (“Ngetco”) contravenes the provisions of sections 28 and 46 of the Registration of Titles Act, Cap 281 and accordingly the Principal Registrar of Titles is hereby ordered to cancel the same.***
- 2. That the Provisional Certificate of Title for the said property issued by the Principal Registrar of Titles to NGETCO INVESTMENT LIMITED and registered in the Land Titles Registry at Nairobi as entry number I.R. 12012/20 is null and void and the Registrar of Titles is hereby ordered to cancel the same.”***

The Motion was supported by the affidavit of **JACINTA MUTIO WAMBUA**, the then appellant’s legal officer, dated 11th December, 1995. In her affidavit, she deposed that the appellant is the proprietor of a

legal charge dated 30th December, 1982 over property known as Land reference No. 3734/1996 (original number 3134/5/291 (the suit property) that is registered in the names of **GEORGE PATRICK MWAGIRU** and **ESTHER WANJIRU MWAGIRU** (herein after the chargors); that the property was charged to secure payment of Kshs.600,000 together with interest and other incidentals; that on 22nd February, 1995 the applicant caused the suit property to be sold at an auction as the chargors had defaulted in the loan repayment and their liability as at 21st February, 1995 stood at Kshs.3,421,545.75; that one **MR. GATONYE KARIUKI** became the successful bidder; that in total disregard to the charge, the 1st respondent caused to be registered a vesting order pursuant to an order issued in Resident Magistrate Civil Case No. 687 of 1991 and purported to transfer the suit property to **NG'ETCO INVESTMENTS LIMITED** the 2nd respondent herein and the then interested party.

In response, **MAXWELL OLOLA**, a director of the 2nd respondent swore an affidavit dated 4th January, 1996. He deponed that he purchased the suit property in an auction held on 28th November, 1994 in execution of a decree issued in R.M. Civil Suit No. 687 of 1991 in which Nairobi City Council sought to recover rates from the chargors; that the suit property was registered in the 2nd respondent's name on 30th May 1995; that the appellant's charge was subject to payment of rates and that the 1st respondent made known its intention of issuing a provisional certificate of title by placing an advertisement in Kenya Gazette Notice No. 775 of 17th February, 1995.

On behalf of the 1st respondent, **JUDITH MARILYNE OKUNGU** the then Registrar of Titles swore an affidavit dated 22nd March, 1999 and deposed that she was obligated to register the vesting order in compliance with the order of the court issued in RMCC NO. 687 of 1991.

The Motion was heard by Kuloba, J who in a ruling dated 30th July, 2003 dismissed the Motion. It is the said dismissal that provoked this appeal.

In a memorandum of appeal dated 29th November, 2004 the appellant listed no less than 9 grounds of appeal. In summary, the appellant contended that the learned judge failed to take into account the appellant's submissions; that the judge erred in finding that the 2nd respondent was not a party to the motion yet he was before the Court as an Interested Party; that he erred in failing to appreciate that he was seized of a Judicial Review application seeking an order of mandamus against the Principal Registrar of Titles; that his decision was influenced by extraneous factors, to wit a suit pending between the 2nd respondent and **MR. GATONYE KARIUKI**, the successful bidder in the auction conducted on behalf of the appellant and finally that he erred in not finding that the property the subject matter of the charge could not be transferred before discharge.

When the appeal came before us for hearing on 16th September, 2015 Mr. Kibuchi, learned counsel for the appellant and Mr. Kaumba, learned counsel for the 1st respondent, asked us to determine the appeal by considering their written submissions.

The appellant's written submissions as well as its list of authorities were filed on 8th September, 2015 whilst the 1st respondent's submissions were filed on 15th September, 2015. There was no appearance on behalf of the 2nd respondent, inspite of service of a hearing notice upon it. Neither did the 2nd respondent file its submissions.

In its submissions, the appellant submitted that the legal charge created by the appellant is a superior legal interest which cannot be discharged to the exclusion of the chargee's rights; that the decree issued by the subordinate court in Civil Suit No. 687 of 1991 was not registrable having been issued by the Subordinate Court and not by the High Court as envisaged by Section 2 of the RTA and lastly that the trial judge erred in not granting an order of mandamus as sought by the appellant.

In opposing the appeal, the 1st respondent's confined its submission to ground 9 of the memorandum of appeal filed by the appellant. Ground 9 faulted the learned trial judge for failing to determine whether the

Principal Registrar of Titles was entitled to transfer the suit property pursuant to an order of the court in RMCC No. 687 of 1991 and whether the Principal Registrar was right in his refusal to rectify the Register by cancellation of the entries for registration of the Vesting Order and Provisional Certificate of Title under powers conferred on him by law. Counsel submitted that the action by the Registrar was in compliance with the court order issued in RMCC No. 687 of 1991 on 14th December 1994 in favour of the 2nd respondent failure of which the 1st respondent would have been held to be in contempt of court. Counsel further submitted that if the appellant was aggrieved by the vesting order, then the appellant ought to have moved the court to either set aside or review the vesting order.

As stated above, the 2nd respondent did not file its submissions inspite of being served with the submissions of the appellant and neither did it appear for the hearing of the appeal inspite of service of hearing notice upon it.

We have considered the record of appeal, the memorandum of appeal, the grounds thereof, the rival submissions of counsel and the law. The facts of the case are fairly straightforward. The appellants charged LR No.3734/496 (original number 3734/5/291) as security for a sum of Kshs.600,000/= advanced to the chargors vide a legal charge dated 30th December, 1983. The chargors failed to repay the loan to the appellant and the latter proceeded to exercise its statutory power of sale. The sum outstanding as at 21st February, 1995 was Kshs.3,421,545.75. In an auction conducted on 22nd February, 1995, **MR. GATONYE KARIUKI** emerged the successful bidder. It is thereafter that it became known that the 1st respondent had on 19th December, 1994 registered a vesting order on the suit property notwithstanding the existence of the charge in favour of the appellant. In the said vesting order; the property was transferred to the 2nd respondent. The appellant in a letter dated 26th May, 1995 addressed to the 1st respondent demanded the cancellation of the vesting order. The 1st respondent declined, thus prompting the institution of the Motion dated 11th December 1995, the subject of this appeal.

The gist of the appellants' complaint in the motion was that the learned judge erred in failing to quash the decision of the Subordinate Court in RMCC No. 687 of 1991 wherein the court granted a vesting order in respect of the suit land which suit land had been charged to the appellant bank. The motion was a Judicial Review application whose jurisdiction operates within the narrow confines of the Law Reform Act and Order 53 of the Civil Procedure Rules. The principles upon which an application for judicial review are founded are well known in that judicial review deals with the procedure of making the decision and not the merits of the decision or lack of it. In **Commissioner of Lands v Kunste Hotel Limited [1979] eKLR** this Court held “... *Judicial Review is concerned ... with the decision making process.*”

Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.” In **Kenya National Examination Council V R exparte Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal No. 266 of 1996**, this Court, whilst expounding on the nature and scope of the remedy of mandamus, stated the following:

“What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed ...”

In **Makupa Transits & Shade & Another v Kenya Ports Authority & Another Mombasa Civil Appeal No. 44 of 2014**, this Court held that :

“The considerations ... are that the decision sought to be impugned was made without or in excess of jurisdiction, breach of rules of natural justice or the decision was blatantly illegal.”

The appellants' prayers were for an order of mandamus to quash the decision of the Subordinate Court in RMCC No. 687 of 1991 and a declaration that the certificate of title issued to the 2nd respondent was null and void.

In a replying affidavit dated 4th January, 1996, **Maxwell Olola** on behalf of the 2nd respondent deposed as follows:

“3. THAT the interested party purchased the suit property at a public auction held on 28th November, 1994, in execution of a Decree issued by a subordinate court of the First Class in Civil Suit No. 687 of 1991, in which the Nairobi City Council sought to recover rates and interest from Mr. George Patrick Mwangi and Esther Wanjiku Mwangi, pursuant to the provisions of Section 17 of the Rating Act, Chapter 267 of the Laws of Kenya.

- 4. THAT consequent upon paragraph 3 hereinabove, the title of the suit property was duly registered in favour of the interested party on 30th May, 1995.**

Annexed hereto and marked “MO-2” is a copy of the Provisional Certificate of Title.

5. -

- 6. THAT at the time the applicant purported to sell the suit property to Mr. Gatonye Kariuki on 22nd February, 1995, therefore, the sale of the property to the interested party had become absolute, the chargors’ freehold interest had become extinguished and there was therefore nothing over which the applicant could exercise its power of sale.**

7. -

8. -

9. -

- 10. THAT I am further informed by the interested party’s advocates on record, which information I also verily believe to be true, that the applicant has been caught by its own laches because:-**

a. -

- b. That although notice of the Registrar of Titles’ intention to issue a provisional certificate of title to the interested party was published as required by Law in The Kenya Gazette – Gazette Notice No. 775 of 17th February, 1995, the applicant failed to file any objection with the Registrar of Titles within ninety (90) days as required and the Registrar of Titles was in the circumstances left with no alternative but to issue the interested party with a Provincial Certificate on 30th May, 1995.**

Annexed hereto and marked “MO-3” is a copy of Gazette Notice No. 775 dated 17th February, 1995.”

It therefore follows as deposed in the affidavit sworn on behalf of the 2nd respondent that the suit property was transferred to the 2nd respondent following the orders issued in the Subordinate Court in RMCC No 687 of 1991 and in total disregard to the charge created in favour of the appellant. Indeed the learned judge noted as much in his judgment. He stated:

“A transfer of title took place and a provisional one issued to the purchaser under the City Council sale, following the registration by the Principal Registrar of Titles, of the Court’s vesting order. The applicant chargee was not notified of all these happenings.”

It is our humble view that having found that the chargee was completely locked out of the happenings in RMCC 687/1991, it was only proper to quash the vesting order that resulted in deregistration of the appellant’s interest as a charge as failure to do so was a breach of the rules of natural justice. How could

the 1st respondent have registered the vesting order in favour of the 2nd respondent yet records held by it showed that the suit property was charged to the appellant? More so, without notifying the appellant?

It is also our humble view that the 1st respondent's actions were in excess of jurisdiction and against the principles of natural justice. In declining to grant orders sought by the appellant the learned judge rendered himself thus:

***“I refuse to grant any of the prayers, for reasons similar to those advanced by the chargee (applicant) in support of its instant application. The chargee, too, is seeking to snatch orders which will obviously have adverse effects on the interests of the City Council of Nairobi, and the title holder under a purchase in the City Council sale. And yet, the City Council and the purchaser are not made parties in the instant application. They are necessary parties who must be joined as parties and afforded a fair opportunity to heard herein. To proceed without them being parties and decide adversely to them would be a violation of the Rules of natural justice.*”**

In the next place, to undo what the principal registrar of titles did in obedience of a court order, and to leave the court order itself intact, without having that order set aside or otherwise vacated, would result in an absurdity and confusion as to what effect (if any) is to be given to the order of the court in execution of which its registration by the principal registrar of titles was the last step.”

Firstly, we observe that the learned trial judge erred in his finding that the 2nd respondent was not a party in the application before him. From the record, **Maxwell Olalo**, a director of the 2nd respondent swore an affidavit dated 4th January, 1996 in Miscellaneous Civil Application No. 1316/1995, which is the subject of this appeal. In the application, the 2nd respondent was named as the Interested Party and it took part in the proceedings. Indeed the 2nd respondent filed grounds of opposition as well as a list of authorities on 8th January, 1996. The 2nd respondent was then represented by the firm of Iseme Kamau who urged the 2nd respondents case on 19th October, 2000. It was therefore incorrect for the learned judge to have found that the 2nd respondent was not a party to those proceedings. He concluded that ***“To proceed without being parties and decide adversely to them would be a violation of the Rules of natural justice.”*** In our view, the learned judge should have come to the same conclusion in so far as the appellant was concerned as it was locked out of RMCC No. 687 of 1991 between **City Council of Nairobi v George P. Mwagiru & Another.**

The learned judge further justified his refusal to grant the order sought by the appellant on the reasoning that ***“... to undo what the Principal Registrar of titles did in obedience of a court order, and to leave the court order itself intact, without having that order set aside or otherwise vacated, would result in an absurdity and confusion as to what effect (if any) is to be given to the order of the court ...”*** With all due respect to the judge, the motion sought to quash the findings in RMCC No. 687/1991. If these were quashed, the order would not be intact. The learned judge further found that: ***“To grant the prayers sought in the instant application may embarrass the trial judge in the yet to be determined HCCC NO. 2959 of 1995 between the two purchasers – one under the City Council sale who was the holder of the provisional certificate of title and the purchaser under the chargee's sale.”***

Again, with profound respect, we do not see the embarrassment that would have been caused. If anything the quashing of the orders in RMCC No. 687 of 1991 would help the trial court in the determination of HCCC No. 2959 of 1995. Otherwise that suit cannot be fully determined before the fate of the Judicial Review application filed by the appellant is heard and determined.

Suffice to state that the appellant's interest was a superior legal interest vis-à-vis any other interest. Counsel for the appellant placed reliance in the case of **Kenya Commercial Bank Limited v Jeremy Will Tsuma, Mombasa HCCC No. 59 of 2013** (O.S), (unreported) where Kasango J dealt with a similar situation and the court referred to a book titled ***“Land Law”*** by **Nigel P. Gravells, 3rd edition**, that provided for the place of a charge as follows:

“The advantage of such real security is that, even if the borrower becomes insolvent, the lender, as a secured creditor, will take priority over the general unsecured creditors of the borrower...”

In our humble view the learned judge ought to have found that the applicant’s interest was superior to any other unsecured interest, including that of the City Council of Nairobi.

The 1st respondent actions in excess of or without jurisdiction is further demonstrated in the process of issuance of the provisional certificate.

The issuance of the provisional title was preceded by an advertisement in the Kenya Gazette Notice No. 775 which provided as follows:

“ GAZETTE NOTICE NO. 775

THE REGISTRATION OF TITLES ACT

(Cap. 281, Section 71)

IUSSUE OF A PROVISIONAL CERTIFICATE the 2nd ***WHEREAS Ng’etco Investment Limited, a limited liability company Investment in Kenya having its registered office at Nairobi, P. O. Box 70416 , Nairobi, is the registered proprietor lessee of the piece of land known as L.R. No. 3734/496, (emphasis added) situate in the city of Nairobi, by virtue of a certificate of title registered as I.R. 121027, and wherein sufficient evidence has been adduced to show that the said certificate of title has been lost, (emphasis added) notice be given that after the expiration of ninety (90 days) from the date hereof, I shall issue a provisional certificate of title provided that no objection has been received within that period.***

Dated the 17th February, 1995.

R. N. MULE,

Registrar of Titles, Nairobi.”

In our view the notice placed in the Kenya Gazettee by the 1st respondent contained falsehoods. The title of the suit property was held by the appellant as the chargee. Clearly, the title of the suit property was not lost as stated in the notice by the 1st respondent’s as the records held by the 1st respondent should have had an entry of the registered charge in favour of the appellant who had the title in its custody. It was also incorrect for the 1st respondent to have stated in the advertisement that the 2nd respondent was the registered owner as the registered owner were the chargors and not respondent. It is this advertisement that preceded the issuance of the provisional title as evidenced by another advertisement by the 1st respondent who placed the following advertisement in the Kenya Gazettee..

“REPUBLIC OF KENYA

REGISTRATION OF TITLES ACT (CHAPTER 281)

PROVISIONAL CERTIFICATE OF TITLE I.R. 12102

I HEREBY CERTIFY THAT by reason of the fact that the CERTIFICATE OF TITLE registered as I.R. 12102/1 has been lost (Emphasis added) this

Provisional Certificate of Title issued under lieu of the lost CERTIFICATE OF TITLE.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 30th day of May one thousand nine hundred and ninety five.

REGISTRAR OF TITLES”

We find that the 1st respondent acted in excess of its jurisdiction in placing the advertisement containing falsehood and based on this falsehood proceeded to issue a provisional title in favour of the 2nd respondent.

In view of all the foregoing reasons, we have come to the conclusion that this appeal is for allowing. We set aside the order of Kuloba, J dismissing the appellant’s motion and substitute thereto an order of certiorari to remove into this Court and to quash the proceedings of the Resident Magistrate’s Court in case No. 687 of 1991 and all the consequential orders. We further direct that the provisional title issued to the 2nd respondent and registered in the Land Titles Registry in Nairobi as entry NO. IR 12012/12 is declared null and void and the 1st respondent is hereby ordered to cancel the same. Costs of this appeal shall be borne by the 1st and 2nd respondents jointly and /or severally.

Dated and delivered at Nairobi this 18th day of December, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR