



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 104 OF 2012

FRANCIS MUREGI KIRAGU.....APPELLANT

VERSUS

JOSEPH GACHIE KIRAGU.....1ST RESPONDENT

JOSEPH KINYUA KIMURI.....2ND RESPONDENT

(Being an Appeal from the decision of the High Court of Kenya at Nyeri (Sergon, J.) dated 29th July, 2011)

in

H.C.C.C. No. 128 of 2008)

JUDGMENT OF THE COURT

[1] On 29th July, 2011, **Sergon J.** pronounced a ruling in **Nyeri Civil Case No. 128 of 2008**, in which two applications were determined. That was the Amended Originating Summons dated 29th October, 2009, by the appellant which in essence was the main suit and a chamber summons by the respondent dated 28th October, 2009. In the Originating Summons the appellant sought *inter alia* for an order of injunction to restrain his brother Joseph Gachie Kiragu and the 2nd respondent from dealing with **TITLE NO. IRIANI/KARIA/518** (*hereinafter referred to as the suit premises*). He also sought to be registered as proprietor of 0.83 Ha out of the suit premises while claiming to have acquired the title by way of adverse possession.

[2] The 2nd respondent was not made a party to that original suit but the records show that he was made a party in subsequent proceedings. He filed the second application seeking his name to be struck out of the record on the grounds that his joinder as a party in the suit was without basis as he became registered as proprietor of the suit premises having acquired the title legally by way of a sale through a public auction that was sanctioned by a court order. He was an innocent purchaser, and there is no possible cause of action against him.

[3] Strangely the parties agreed to have the two applications determined together and the matters to be canvassed through written submissions. We say ‘*strangely*’ because there was a substantive prayer regarding a claim of adverse possession and allegations of fraudulent transfer of the suit land. Be that as it may, the parties filed written submissions which the learned Judge considered and in his ruling, dismissed the appellant's application dated 19th August, 2009, with costs. The application by the 2nd respondent was allowed and his name was struck out of the record. The Judge found that there was no cause of action against the 2nd respondent.

[4] This is the ruling that provoked the present appeal in which the appellant has raised a total of five grounds of appeal. However in his address to us, Mr. James Nderi, learned counsel for the appellant, argued all the grounds together. He submitted that by striking out the name of the 2nd respondent from the record, the appellant was prejudiced; the suit should have been allowed to proceed to a full hearing on its merits. Moreover, the 2nd respondent was joined in the suit through an order made by the same Judge. Mr. Nderi argued that the issues raised by the appellant regarding how he came to be registered as proprietor of the suit premises could not have been appropriately determined during an interlocutory hearing as the claim by the appellant was one in rem; the fact that the appellant was an objector in **CMCC No. 7457 of 1988**, did not mean that he knew of the existence of the suit as he came to know about the suit when he was served with an order restraining him from dealing with the property. Mr. Nderi urged us to allow the appeal so that the suit by the appellant against the 2nd respondent can proceed to a full hearing.

[5] On the part of the 1st respondent who as mentioned earlier is a brother of the appellant, supported the appeal. During the hearing of this appeal, he appeared in person. The 1st respondent was the registered proprietor of the suit premises. He was sued in **CMCC No. 7457 of 1988** at Milimani Court by Samuel Muriithi in a running down matter who obtained a decree against him and the suit premises which he claimed he held in trust for his siblings was sold in execution of the decree. He argued that although he had sold the motor vehicle that allegedly caused the accident, he was adjudged to pay the decretal sum. He argued that he held the suit premises in trust for his siblings the appellant included. When the learned magistrate issued the vesting order, the appellant had obtained an order of injunction against the 1st respondent. That order was brought to the notice of the magistrate before she issued the vesting order but she ignored it. He urged us to allow the appeal.

[6] On the part of the 2nd respondent, this appeal was opposed; M/s Omwakwe, learned counsel, submitted that there was no merit in sustaining a suit against her client who was registered as proprietor of the suit premises pursuant to a sale by way of public auction; the appellant in cohorts with the 1st respondent attempted to scuttle the sale through abuse of the court process; the appellant and the 1st respondent colluded and he filed objection proceedings in another suit which was dismissed. According to counsel for the 2nd respondent the issues regarding the decree in **CMCC No. 7457 of 1988** were finalized and hence they are now *res-judicata*. The suit premises changed ownership and, therefore, the doctrine of adverse possession could not arise regarding the ownership by the 2nd respondent who purchased the suit premises in an auction; the 2nd respondent also sold and transferred the suit premises to a limited liability company. Counsel urged us to dismiss the appeal.

[7] This is a second appeal, and that being so, we have a duty to re-evaluate the evidence, assess it and make our own conclusions. See **SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD., [1968] EA 123** at P. 126 and **WILLIAMSON DIAMONDS LTD. V BROWN, [1970] EA 1**. It is in view of the principles stated in the foregoing authorities that we have endeavored to set out albeit briefly what was before the superior court. We have considered this appeal and in our view, the twin issues before us is whether there was justification in striking out the 2nd respondent from the originating summons, and whether the suit raised any triable issue as against the 2nd respondent.

[8] On the outset, we think the suit by the appellant in the Court below raised some substantive issues of law touching on land. A cursory look on this matter, one may be tempted to think it was a simple matter where the 1st respondent's suit premises was sold in a public auction to satisfy a decree in **CMCC**

NO. 7457 OF 1988 at Milimani Court. According to counsel for the 2nd respondent, the appellant colluded with his brother the 1st respondent to block the execution of the aforementioned decree by unsuccessfully filing an objection which was dismissed on technicality. Also, counsel submitted the appellant abused the court process by failing to serve or include the 2nd respondent in **HCCC No. 128 of 2008 (OS)**, where he obtained an interim order of injunction restraining his brother from transferring the suit premises. The said order was presented before the trial magistrate during the hearing of an application for a vesting order but the appellant had deliberately failed to include the 2nd respondent so as to circumvent the sale by public auction.

[9] These issues have given us some concern as the subject matter is a developed parcel of land that measures 3.32 Hectares or approximately 10 acres which was sold for a sum of Ksh 1,500,000/= in execution of a decree of a sum of about Ksh 104,002/=. Upon a close look at these proceedings leading to the sale of the suit premises as annexed to the affidavits especially the claim by the appellant that he was not aware that the transfer of the suit premises to the 2nd respondent was effected when he filed **HCCC No. 128 of 2008 (OS)** on the 29th October, 2008 when he filed the original suit the subject matter of this appeal. We are satisfied that the appellant could not be penalized for this and this did not justify the suit being an abuse of the court process.

[10] According to the copy of Title Deed the 2nd respondent was registered as proprietor of the suit premises on 4th August, 2009. In our view, the appellant cannot be said to have withheld material information by not including the 2nd respondent as party when he filed the suit because by then, the 2nd respondent had not been registered as the proprietor of the suit premises. The learned Judge also acknowledged that there is an appeal regarding **CMCC No. 7457 of 1988** being **HCCA No. 445 of 2009** but said nothing about it perhaps because it was before another court. We also think this was an important factor for the Judge to consider whether that appeal would be rendered nugatory in case it was successful. The fate of that appeal is not quite clear to us as counsel for the 2nd respondent stated from the bar that her client transferred the suit property to a limited liability company, thus we say no more about the issue.

[11] One other thing that stands out in this appeal is that the appellant's claim against the 2nd respondent was not heard on merit. Issues were raised regarding a caution the appellant registered against the property on 19th August, 2008 and a restriction against the dealings with the suit premises until **HCCC No. 128 of 2008**, was determined. With respect, the learned trial Judge misapprehended these issues when he held that there were no triable issues. This court has emphasized time and again that a right to a hearing is a well protected one under the Constitution and the overriding objectives under the Civil Procedure and also the Appellate Act lay more emphasis on the principle of proportionality. When disputing parties bring their claims to court, they should be heard unless they are behold redemption. See also the oft' cited case of **D. T. DOBIE & COMPANY KENYA LTD V JOSEPH MBARIA MUCHINA, C.A. NO. 37 OF 1978**. See also the case of **RICHARD NCHAPPI LEIYAGU V IEBC and 2 OTHERS CA NO 18 of 2013**

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

[12] As aforesaid, it is the task of the learned trial Judge to discern the issues for determination and we find that certain issues were unfortunately misapprehended. Such issues that were raised in the Amended Originating Summons were the transfer of the suit premises in the face of the court order, whether the vesting order of the suit premises could issue by the subordinate court, were issues which could not be glossed over. We do not think that the appellant's suit over the suit premises was so weak and beyond redemption to deserve a summary dismissal; this appeal therefore has merit.

[13] In the upshot, we allow the appeal, set aside the order dismissing the appellant's prayer for injunction and the order allowing the 2nd respondent's name to be struck out of the record. Accordingly prayer number one in the amended originating summons is issued to preserve the status quo in respect of the suit premises pending the determination of the **HCCC No. 128 of 2008**, on its merit before any other Judge other than Sergon J. The name of the 2nd respondent is reinstated in the suit.

Costs of this appeal to abide the outcome of the suit before the High Court.

Dated and delivered at Nyeri this 22nd day of January, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR