



IN THE COURT OF APPEAL

AT NYERI

CORAM: VISRAM, KIAGE & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 192 OF 2011

BETH KAARI 1ST APPELLANT

PRUDENCE MUKIRI2ND APPELLANT

versus

M'NYERI M'RIMUNYA RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru, (Kasango, J.) dated 25th September, 2009

in

H.C.C.A. No. 80 of 2004)

JUDGMENT OF THE COURT

1. The suit property in this appeal is land parcel **NO. KARINGANI/MUIRU/1749** which was acquired by the respondent in a public auction and registered in his name on 18th February 2003. Prior to this date, the suit property was registered in the name of M'Ingentu M'Mwereria (now deceased) on 8th December 1994 who was the husband to the 2nd appellant and father to the 1st appellant.
2. The deceased was indebted to a third party who filed suit against him in **Meru HC Civil Suit No. 147 of 1987**. The deceased paid the debt but did not settle the costs of the suit. The deceased died on 3rd October 1998 and after his death, the decree holder in **Meru HCC No. 147 of 1987**, initiated execution proceedings to recover the costs of the suit. Subsequently, a public auction was held in which the deceased property being land parcel no. **KARINGANI/MUIRU/1749** was auctioned to recover the costs of **Meru HC Civil Case No. 147 of 1987**. The respondent was declared the highest bidder and the suit property was transferred and registered in his name on 18th February 2003. The respondent as the new registered proprietor moved the High Court in **Meru in Civil Case No. 80 of 2004** to evict the appellants who are members of the family of the deceased and who have been living on the suit property since 1994.
3. The High Court (Kasango J.) upon hearing the case upheld the respondent's title to the suit property and ordered eviction of the appellants. Aggrieved by this decision, the appellants have lodged this appeal.
4. The appellants have cited eleven (11) grounds of appeal which can be compressed as follows:

- i. *The learned Judge erred in law in declining to grant an adjournment to the appellants to produce the original death certificate for the deceased.*
 - ii. *The learned Judge erred in not holding and finding that having been registered the proprietor of the suit property after the death of the 2nd appellant's husband, the respondent's title is subject to the appellant's rights and the rights of other beneficiaries to the estate of the deceased which had accrued by virtue of the Law of Succession Act, Cap 160 of the Laws of Kenya.*
 - iii. *The learned Judge erred in failing to hold and find that at the time the respondent was registered as proprietor of the suit property, the appellants were in possession and occupation of the property and the appellant's rights are protected under Section 30 (g) of the Registered Land Act as overriding interests.*
 - iv. *That the learned Judge erred when she failed to hold and find that the sale of the suit property by public auction to the respondent was fraudulent and illegal.*
5. At the hearing of the appeal, the appellants were represented by learned counsel P.G. Nganga while the respondent was represented by learned counsel B.G. Kariuki.
 6. Counsel for the appellant elaborated on the grounds of appeal. It was submitted that the deceased died on 3rd October 1998 and as of that date, the interest of the appellants as beneficiaries of the estate of the deceased accrued and vested under the Law of Succession Act. It was submitted that since the public auction was done after the date of death of the registered proprietor, the respondent acquired title to the suit property subject to the interest of all the beneficiaries of the estate of the deceased. It was submitted that if the decree holder or any person was owed any costs in relation to **Meru HCCC No. 147 of 1987**, the proper procedure was to be enjoined in proceedings for confirmation of grant of letters of administration as creditors to the estate of the deceased. Further, it was submitted that the respondent was not a *bona fide* purchaser for value of the suit property in that he had notice and knowledge of the death of the deceased. It was submitted that the respondent was related to the deceased and the appellants and he even attended the burial of the deceased. Counsel submitted that at the time the respondent allegedly bought the property in a public auction, he knew the registered proprietor was dead; knew that the appellants and other beneficiaries of the estate of the deceased were in possession and occupation of the suit property; knew that the homestead of the deceased and his family was established on the land and he never made any inquiries from the appellants who have been in possession and occupation since 1994. Counsel submitted that the possession and occupation of the appellants is an overriding interest in the suit property. The appellants averred that they did not see any advertisement for public auction in the daily newspapers and the deceased never indicated to them that he was indebted; however, they knew that **Meru HC Civil Suit No. 147 of 1987** existed.
 7. Counsel for the respondent opposed the appeal submitting that the respondent was a *bona fide* purchaser for value without notice. It was submitted that if the appellants had any interest in the suit property, such interest was extinguished by the public auction. Counsel submitted that the interest of the appellants in the suit property was co-terminus with the interest of the deceased in the property; that the appellants could not have greater right to the suit property than the deceased and since the deceased had not satisfied the costs of the decree in **Meru HC Civil Case No. 147 of 1987**, the deceased property was available to satisfy the costs of the suit. Counsel further submitted that the appellants were not the legal representatives of the estate of the deceased and could not question the sale of the suit property by public auction.
 8. We have considered the evidence on record and submissions by both counsels and have analyzed the judgment. This is a first appeal and it is our duty to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] E A 123**, thus:

“An appeal to this court from a trial by the High Court is by way of retrial 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 witnesses and should make due allowance in this 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

9. This Court further stated in Jabane v Olenja [1986] KLR 661 at pg 664, thus:

"More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni v Kenya Bus Services (1982-88) 1 KAR 870."

10. Our assessment of the judgment reveals that the learned Judge did not address her mind to the fact that the appellants were in possession and occupation of the suit property at the time when the respondent became the registered proprietor thereof. The learned judge did not address her mind to the critical fact that the public auction was conducted after the death of the registered proprietor and the provisions of the Succession Act, Cap 160 of the Laws of Kenya had come into play. The learned Judge ignored the evidence that execution proceedings to recover costs in **Meru HCCC No. 147 of 1987**, were initiated after the death of the registered proprietor and the legality of this was put in issue. As was stated in the case of Marigi –v- Muriuki & 2 Others, Civil appeal No. 189 of 1996 {2008} 1 KLR 1073, the law of succession recognizes the rights of wives and children over their husband's or father's estate. These rights are inchoate and accrue upon the death of the husband. In the instant case, the inchoate rights of the appellants had accrued on 3rd October 1998 the date of death of the registered proprietor and the learned Judge erred in law in failing to address this issue. The learned Judge erred in failing to give adequate consideration to the issue of the alleged illegality or irregularity of the public auction as stated in the counter-claim.

11. It is our considered view that the High Court is a court of law and a court of equity and it should dispense substantive and not technical justice. As was stated in KCB –v- Oisebe, (1982) LLR 66 CAK, "a claim that a matter is a nullity makes all proceedings flowing from it exactly that: a nullity." The learned Judge ought to have addressed her mind to the possible irregularity and nullity of the sale when it was brought to her attention. The learned Judge erred in failing to address the issue that the respondent may not be a bona fide purchaser for value without notice (See Olato-v- National Bank of Kenya, HC Civil Case No. 665 of 1999). In totality, the learned Judge erred in law and fact in ignoring the critical issues that are on record and ignored the possible application of the Succession Act to the dispute between the parties. This court is mandated through the overriding objectives as enshrined in **Sections 3A and 3B of the Appellate Jurisdiction Act**. Regarding that principle, this Court in DOUGLAS MBUGUA MUNGAI VS. HARRISON MUNYI, CIVIL APPLICATION NO. NAI 167 OF 2010, observed that:

"We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly" As was stated in Stephen Boro Githa vs. Family Finance Building Society & 3 Others, Civil Application No. Nai. 263 of 2009.

"The overriding objective overshadows all technicalities, precedents, rules and actions ... and whatever is in conflict with it must give way."

12. In relation to grounds 1 to 4 in the memorandum of appeal, the appellant contends that the learned Judge erred in law in declining to grant an adjournment to the appellants on 3rd June 2009 to enable the court file of **Meru HCCC No. 147 of 1987**, to be produced in court. We have

examined the record of appeal and are satisfied that when the order was made declining adjournment, the appellants did not lodge an appeal against the order. There can be no appeal within an appeal and no notice of appeal was filed against the refusal to adjourn the hearing. Further, the judgment delivered on 25th September 2009 does not address the issue of adjournment and as the appellants never appealed against the refusal to adjourn the hearing; this ground of appeal has no merit.

13. The upshot of our evaluation of the judgment and record of appeal as well as the submissions by counsel and the applicable law leads us to the conclusion that substantive justice requires that the dispute between the appellants and the respondent be heard and determined *de novo*. We are reminded of Madan, JA (as he then was) in *Chase International Investment Corporation and Another vs. Laxman Keshra and Others*[1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred”.

14. This court has a duty to do justice and to see that justice is done. Equity and substantive justice demands that we set aside as we hereby do the judgment and decree of the High Court delivered on 25th September, 2009, and substitute the same with the order that the High Court Civil Suit No. 80 of 2004 be and is hereby remitted to the High Court for re-hearing *de novo* and determination of the following issues in addition to the issues raised in the plaint and counter-claim.

- a. ***The legality of initiation of the execution proceedings and the procedure followed that led to the public auction that sold the suit property.***
- b. ***Whether the respondent was a bona fide purchaser for value without notice of the suit property.***
- c. ***Do the appellants have an overriding interest in the suit property as against the respondent?***
- d. ***The legal effect of the public auction having been conducted after the death of the deceased and whether such sale could transfer title taking into account the relevant provisions of the Succession Act, Cap 160 of the Laws of Kenya.***

15. The *de novo* hearing of the suit before the High Court shall be by any other judge except Justice Mary Kasango. Recognizing that we have remitted the dispute between the parties to the High Court for determination, we make no order as to costs.

Dated and delivered at Nyeri this 25th day of September, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

PATRICK O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR