



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, ONYANGO OTIENO & KOOME, J.J.A.

CIVIL APPEAL NO. 90 OF 2005

BETWEEN

STEPHEN MWAURA NJUGUNA.....APPELLANT

AND

DOUGLAS KAMAU NGOTHO.....RESPONDENT

Consolidated with

CIVIL APPEAL NO. 247 OF 2007

BETWEEN

STEPHEN MWAURA NJUGUNA.....APPELLANT

AND

DOUGLAS KAMAU NGOTHO

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENTS

(Appeal from the rulings and judgments of the High Court of Kenya at Nakuru (Muga Apondi, J) dated respectively

on the 21st February 2005 and 21st September, 2004 and (Kimaru, J) dated 12th July, 2007

in

H.C.C.C. NO. 215 OF 1998)

JUDGMENT OF THE COURT

In an order made and dated 14th March, 2012, this Court differently constituted directed that ***Civil Appeal Nos. 90 of 2005*** and ***247 of 2007*** be listed for hearing on the same day before one bench which would thus give appropriate directions as to the manner of dealing with them. This was done and on 4th June, 2012, the two appeals were listed before us when we made an order that the two appeals be consolidated

and be heard in **Civil Appeal No. 90 of 2005**. We also noted as was observed by this Court differently constituted earlier on that in **Civil Appeal No. 90 of 2005**, there were two appeals filed in one record of appeal. Although, on procedural law this might not have been proper but in the spirit of the provisions of **Section 3A and 3B** of the Appellate Jurisdiction Act as well as **Article 159** of the Constitution, and as the appellant is in person, we decided nonetheless to hear the two appeals so as to ensure substantive justice is attained in the entire saga. This judgment is therefore in respect of the consolidated three appeals, two of which are in **Civil Appeal NO. 90 of 2005**. Two of these appeals, namely the appeal against the ruling of *Muga Apondi J.* dated 21st September, 2004 in **Civil Appeal No. 90 of 2005** and one against the ruling of *Kimaru J.* dated 12th July, 2007 in **Civil Appeal No. 247 of 2007** are both interlocutory appeals whereas appeal against the judgment of *Muga Apondi J.* in **Civil Appeal No. 90 of 2005** is the main appeal against the final judgment on the entire case. It is however, important to observe here as we do, that all the appeals emanate from the decisions in respect of High Court Civil Suit No. 215 of 1998.

In sequence, on 21st September, 2004, *Muga Apondi J.* delivered judgment in the suit in which he allowed the respondent's prayers and declared the respondent the lawful registered owner of all those pieces of land known as *L.R. Bahati/Kabatini Block1/2009* and *L.R. No. Bahati/Kabatini Block 1/2011* and ordered the appellant to surrender the rents he had received from tenants to the respondent and to be evicted from the said premises within 60 days after the delivery of that judgment. The appellant felt aggrieved with that decision and lodged an appeal against it. In the meanwhile, vide a chamber summons dated 12th October, 2004, the appellant sought temporary injunction orders to be issued against the respondent restraining him from executing the judgment for eviction and rent collection by the appellant from the suit properties until further orders of the court or until full determination of the appeal he intended to file against the decision of *Muga Apondi J.* dated 21st September, 2004. The appellant also sought costs of the application. That is the application which was heard by *Muga Apondi J.* and which was dismissed by the learned Judge in a ruling dated and delivered on 21st February, 2005 which ruling is the subject of the appeal initiated by way of a notice of appeal dated 24th February, 2005. That is the interlocutory appeal forming the second appeal in **Civil Appeal No. 90 of 2005**. It is the appeal, we deemed fit to be considered along with the main appeal only on grounds of seeking for substantive justice in the entire matter without any undue regard to the technicalities as we have stated above. We emphasize though that as is clear, it was an appeal which was challenging the learned Judges' refusal to grant temporary injunction till the main appeal was heard or till further orders of the court. We will revert to reasons why we do emphasize this hereafter.

The second appeal i.e. **Civil Appeal No. 247 of 2007** arises from the Ruling of *Kimaru J.* in chamber summons dated 11th July, 2007 in which the appellant sought orders as follows:-

“(a) That the eviction orders by Hon. Mr. Justice Muga Apondi on 21st day of September, 2004 and issued by the High Court of Kenya on 31st January, 2007 be declared void and/or set aside.

(b) That the applicant who is the charger in possession of the suit properties with an overriding interest in possession or actual occupation as the owner occupier be reinstated into the suit. I (sic) until the finalization of the appeal registered under the Nairobi Civil Appeal No. 90 of 2005 pending for hearing and determination before the Court of Appeal.

(c) That costs of this application and damages herein be borne by the respondent.”

The application was filed over two years after *Muga Apondi J.* had refused the injunction application and close to three years after the eviction orders issued by the same learned Judge of the High Court. The application was placed before *Kimaru, J.* who after full consideration dismissed it addressing himself thus:-

“The application filed by the applicant cannot be entertained by this court for two reasons;

(i) This Court cannot sit on appeal on an order issued by a court of concurrent jurisdiction.

(ii) ***This Court has no powers to stay the execution of the decree or order where a court of concurrent jurisdiction issued the order or decree in mandatory terms. In any event, the application before this Court is not seeking stay of execution of the decree or order pending the hearing of the appeal. In the circumstances, therefore, I find no merit whatsoever with the application filed by the applicant herein.***

This is the ruling that resulted in the second interlocutory appeal which is the appeal in ***Civil Appeal No. 247 of 2007***. As is clear from the two records before us, all the appeals – one main appeal and two interlocutory appeals resulting from the pleadings and decision in the High Court at Nakuru ***Civil Suit NO. 215 of 1998*** and whereas the main appeal in ***Civil Appeal No. 90 of 2005*** is challenging the decision of the learned Judge in that suit dated and delivered on 21st September, 2004, the two interlocutory applications made after that judgment with the interlocutory appeal in ***Civil Appeal No. 90 of 2005*** arises from refusal to grant injunction against that judgment and interlocutory appeal in ***Civil Appeal No. 247 of 2007*** arises from the application seeking that the same judgment be set aside and the applicant be reinstated back to the suit properties. The orders that were sought before the High Court in respect of both applications were sought pending the hearing of the main appeal in ***Civil Appeal No. 90 of 2005***.

In the scenario obtaining above, it behoves us to consider the substantial appeal against the judgment of *Muga Apondi J.* dated and delivered on 21st September, 2004 first as in our view, result of the above either way would result in answers to the two interlocutory appeals.

The facts giving rise to the appeal as can be deciphered from pleadings and proceedings in the record are straight forward. The appellant, ***STEPHEN MWAURA NJUGUNA***, was, before 1989 the registered proprietor of two parcels of land known as *LR No. Bahati/Kabatini Block 1/2009* and *L.R. No. Bahati/Kabatini Block 1/2011*. There was a development on the properties and tenants were occupying the premises. In or about August, 1989, he charged the suit properties to ***M/s Barclays Bank of Kenya Limited*** in consideration of a loan granted by the same bank. In January, 1996, the loan remained unserviced and Barclays Bank Limited sold the properties at a public auction in exercise of its statutory powers of sale. They were sold to one ***Thomas Njenga Ngotho*** who in turn sold it to the respondent.

The respondent was thereafter registered the owner of the two pieces of land. The record shows that the appellant did not challenge this action taken by Barclays Bank of Kenya Limited to realize securities offered for the loan. However, the record indicates that in a plaint dated and filed on 5th June, 1996 about five months after the sale of the properties and after the respondent became the registered owner thereof, five people who included, wife, daughter and son of the appellant and two others who claimed to have been registered owners of the suit properties sued Barclays Bank, Nakuru District Land Registrar, the appellant, the respondent, the first purchaser of the property at the concluded auction and the Attorney General seeking several declaratory orders, and order that the sale of the said plots involving the defendants in that suit was fraudulent and therefore null and void and general damages. The appellant, who was the third defendant in that suit, denied allegations against him in that plaint, particularly that he fraudulently charged the suit properties and indicated that he would seek indemnity from Barclays Bank of Kenya Ltd and the Nakuru Land Registrar. That suit was dismissed for want of prosecution and a decree to that effect issued on 11th March, 2002. We note that the suit was dismissed about six years later for want of prosecution and as at the time it was dismissed, there is no record that the appellant had taken action to have Barclays Bank of Kenya indemnify him for any loss he suffered or stood to suffer.

Be that as it may, the result was that no tangible action was taken by the appellant to challenge the Bank's exercise of its statutory powers to sell the suit properties to recover the debt owed to it by the appellant. We emphasize this aspect of the case because the thrust of the appellant's case is that that sale was fraudulent and so was null and void. Resulting from that stand, the appellant refused to vacate the suit premises and continued to collect rent from the tenants as he had done before and did not surrender it to the respondent.

The respondent was not amused. He moved to the court by way of a plaint in High Court at Nakuru ***Civil Case No. 215 of 1998***. As we have stated above, he claimed that the appellant had without colour by right and, or authority continued to remain, occupy, and use the suit property despite the fact that the

respondent was the rightful and registered owner of the premises and despite demands from the respondent that he vacates the suit premises, and that the appellant had illegally collected rent from the tenants of the same premises without the respondent's authority. The respondent therefore prayed for judgment against the appellant for:-

“(a) A declaration that the plaintiff is the registered owner of all those pieces of land known as L.R. Bhahti/Kabatinei Block 1/2009 and L.R. Bahati/Kabatini Block 1/2011.

(b) A declaration that the defendant legal right to remain on the suit property or collect rent for the tenants occupying shops on the suit property ended with the sale of the same by the Bank.

(c) An order that defendant do surrender rent received from the tenants to the plaintiff in default whereof the plaintiff have judgment for the same.

(d) Eviction orders.

(e) Costs of the suit.

(f) Any other relief that this honourable Court may consider fit and just.”

In a statement of defence dated 24th January, 2000, filed by the appellant's then advocates, *Komosi & Company*, the appellant denied being the registered owner of the subject parcels of land; denied having charged them to Barclays Bank of Kenya and claimed that the two pieces of land were fraudulently charged to Barclays Bank of Kenya Limited, and that fraudulent claim was the subject matter of Nakuru **HCC No. 280 of 1996**. He further alleged that Barclays Bank put up the suit properties for sale on 24th January, 1996, but no acceptable bids were made and if they were sold to *Thomas Njenga Ngotho* as alleged then that sale was made on a private treaty which offended the law, and thus the sale to *Thomas Njenga Ngotho* was fraudulent although he acknowledged that the respondent was the registered owner of the suit premises. He set out particulars of fraud which were that:-

“(a) Selling the suit premises by private treaty.

(b) purporting to have sold the suit premises by public auction on 24th January, 1996 when in fact in that auction, one of the purchasers failed to raise the required 25% whereas the other bids for the other property were below the resale price.”

He ended that statement of defence by denying remaining in the suit premises and collecting rents for the tenants and put the respondent to show proof of the two allegations.

After the normal procedural requirements were surmounted and the pleadings were closed, *Muga Apondi J.* heard the suit in which the respondent gave evidence and called no witness whereas the appellant gave evidence and called one witness, who produced court file to **No. 215 of 1998**. After consideration of the evidence available, the learned Judge gave judgment for the respondent stating in doing so as follows:-

“From the evidence on record, it is crystal clear that the defendant was the lawful registered owner of L.R. Bahati/Kabatini Block 1/2009 and L.R. NO. Bahati/Kabatini Block 1/2011. The copies of Title deeds proving the above have been attached in the file.

Secondly, it is also clear that the defendant had received a loan from the Barclays bank Ltd and used his properties as security. Though the defendant conceded that he had received money from the Bank, he denied knowledge of the amount that had been lent to him. Having acknowledged receipt of the above loan, the defendant never made any attempts to show that he had repaid the same at any particular time.

Thirdly, it is apparent that the defendant never filed any suit against Barclays bank for unlawfully

using its statutory powers of sale or fraudulently transferring his property to the plaintiff. Significantly, the defendant also never filed any counter-claim in this suit. Having perused the evidence on record carefully, I only find that the plaintiff lawfully obtained the land – L.R. Bahati/Kabatini Block 1/2009 and L.R. No. Bahati/Kabatini Block 1/2011.

Both parcels of land were obtained without any fraud on the part of the plaintiff. The upshot is that the plaintiff has proved his case on the balance of probabilities. I hereby dismiss the defence case which has no merit at all. I also enter judgment in favour of the plaintiff on the following terms:-

- (a) That the plaintiff is the lawful registered owner of all those pieces of land known as L.R. Bahati/Kabatini Block 1/2011.**
- (b) That the defendant's legal right to remain on the suit property or collect rent from the tenants occupying shops on the suit property ended with the sale of the same to the Bank.**
- (c) That the defendant do surrender the rents received from the tenants (from the date of the sale of the property to the plaintiff) to the plaintiff in default whereof the plaintiff have judgment for the same.**
- (d) That eviction orders do issue against the defendant 60 days after the delivery of the judgment.”**

This is the judgment that prompted the appeal before us premised on several grounds set out in part B of the entire memorandum of appeal. Part A are grounds against the Ruling of the same Judge in respect of the application for injunction. We have touched on it above. For purpose of the main appeal, the memorandum is covered in part B and thirteen (13) grounds cited therein. As the grounds are lengthy we will not reproduce them in this judgment but we have fully perused and considered them. The appellant also filed written submissions which he highlighted when the appeal was heard. The main thrust of his submission as we understood it is that the public auction that was carried out to sell his pieces of land, no bid was accepted and thus in law, the sale of the properties to *Thomas Njenga Ngotho*, who later sold them to the respondent was illegal, fraudulent and was criminal in nature. That being so, he argued the property remained his much as he acknowledged in his defence that the respondent was the registered owner. In his view, as the sale to Thomas was fraudulent, the sale to the respondent was null and void and the respondents title could not in law convey any interest. He urged us to allow the appeal.

Mr. Kimatta, the learned counsel for the respondent submitted that the appeal lacked merit as the appellant had not effectively challenged the sale carried out by Barclays Bank of Kenya Limited to realize the securities which were the two pieces of land and that the appellant's allegations against Barclays Bank of Kenya and *Thomas Njenga Ngotho* who are not a parties in this suit are misplaced in law. He felt that as the appellant did not challenge the original sale and as the suit filed against him by his wife, son and others against Barclays Bank and himself was dismissed, there was no way the sale by *Thomas Njenga Ngotho* to the respondent could be challenged. Thus to him the appellant had no business remaining on the land. *Mr. Okeyo* for the interested party associated himself with *Mr. Kimatta*.

We have anxiously considered the record before us, the pleadings, judgment, written submissions by the appellant and his oral submissions before us, sentiments by the three learned counsel and the law. The parties that were before the learned Judge of the High Court in *HCCC No. 215 of 1998*, were two, the appellant who was the defendant and the respondent who was the plaintiff. The respondent bought the suit properties from one *Thomas Njenga Ngotho*, who was not a party to this suit. The same *Thomas Njenga Ngotho* had bought the properties from Barclays Bank of Kenya Ltd at a public Auction. That Barclays Bank of Kenya Ltd was not a party in the suit. If Barclays Bank sold the properties to *Thomas Njenga Ngotho* in a fraudulently conducted public auction, only the two can answer to such allegations but not the respondent who bought the property from *Thomas Njenga Ngotho* and got a clean title from the same *Thomas Njenga Ngotho* unless it was proved that the respondent participated in fraud perpetrated by Barclays Bank and *Njenga Ngotho*.

Thus the appellant's challenge of that title is misplaced as the parties that could have been held in law to

account for the same were not made parties to the suit and are indeed not parties to the main appeal before us. In *HCCC No. 280 of 1996*, the appellant, who was one of the defendants stated in his defence that he would seek indemnity from Barclays Bank of Kenya, but he never went beyond that wish stated in his defence and that suit was dismissed for want of prosecution. Had he taken up that matter even in that case or had he sought and obtained the joinder of Barclays Bank and *Thomas Njenga Ngotho* in this case, there would have been a leg for him to stand on. But as matters stand, having considered that aspect of the case, a fresh as we now do, this being a first appeal, we have no alternative but to agree with the *Mr. Kimatta* and the learned Judge that the failure of the appellant to challenge the Bank's exercise of its statutory powers of sale in this case was fatal and further, we also agree that his failure to join the Bank in the suit in the High Court and further failure to file a counterclaim in the suit before the High Court made it impossible for the court to consider matters that involve strangers that were not before the Judge.

Lastly, in respect of the main appeal we find it difficult to appreciate the appellant's contention that the civil suit *NO. 215 of 1998* was *res judicata* all because it was filed during the lifetime of court case *No. 280 of 1996*. *H.C.C.C. No. 280 of 1996* was filed by five people all of who were not parties to *H.C.C.C. No. 215 of 1998*. Its cause of action was different from the respondent's claim and in any case that case was dismissed for want of prosecution and thus was not heard and finalized by any competent court of law.

We see no merit in that allegation. We also see no merit in the allegation that criminal offence was committed by any of the parties in this case because such an allegation remained an allegation without any proof in a criminal court. If in any case there was fraud in the sale of the properties at public auction, and if the same was proved, it would be a good ground for claiming general damages. But that would not obtain here as in the matter before us, the parties alleged to have been involved in the same are not before us.

In the result, our view is that the main appeal lacks merit and it cannot stand. It is dismissed with costs to the respondent.

The second appeal against the ruling of *Muga Apondi J.* was as we have stated above, an interlocutory appeal. The original chamber summons which sought orders of injunction to restrain the respondent from executing the judgment for orders of eviction and rent collection and that was sought to last upto the determination of the appeal. The appeal has now been heard and determined. In the circumstances, granting of the appeal would be an act in futility. In any case that application was seeking an order that a judgment be enjoined. That in law is not possible. What the law provides for is a stay of the orders emanating from the judgment of the court if such orders are positive, that is if such orders direct something to be done or not to be done, but no injunction can issue against a judgment of a competent court of law. Thus either way the interlocutory appeal in *HCCA No. 90 of 2005* lacks merit. It is dismissed with costs to the respondent.

That leaves the Civil Appeal No. 247 of 2007 to be considered. That appeal arose out of a decision of *Kimaru J.* upon an application by way of chamber summons that sought as we have stated above, that eviction orders by *Muga Apondi J.* delivered on 21st September, 2004 be set aside, and the appellant be reinstated into the suit premises "until the finalization of the appeal registered under Nairobi *Civil Appeal No. 90 of 2005* pending the hearing and determination before the Court of Appeal."

Well, that appeal *No. 90 of 2005* has been finalized as is indicated above in this judgment and the eviction orders has been confirmed. That being the case, again, we must conclude that this interlocutory appeal, like the one in *Civil Appeal No. 90 of 2005* has been overtaken by events. In any case, *Kimaru J.* was perfectly on the spot. The learned judge had no jurisdiction to hear and determine a matter that was decided by a fellow judge of concurrent jurisdiction. He could not for instance set aside a judgment of *Muga Apondi J.* a Judge who has the same jurisdiction as himself. Such setting aside could only be done by an appellate court but not by a Judge of the High Court as the appellant sought.

The sum total of all the above is that each appeal lacks merit and each is hereby dismissed with costs to the respondent.

DATED and DELIVERED at NAKURU this 9th day of August, 2012.

E.M. GITHINJI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

M.K. KOOME

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR