



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 95 OF 2001

BETWEEN

Y. F. O. MASAKHALIA

I. K. MUTUKUAPPELLANTS

AND

NAIROBI CITY COUNCIL

STEPHEN WAIGWA MURAGE

SIMON MBOGO MUCHIRI

JAMES WAHOME GITURORESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Aluoch, J.) dated 28th September, 2000

in

H.C. MISC.C. NO. 974 OF 1995 (O.S.)

JUDGMENT OF THE COURT

This is an appeal against the ruling of Aluoch, J. (as she then was) dated 28th September, 2000 dismissing an application to set aside or review the vesting order granted by the self-same Judge on 25th September, 1995.

The suit land original L.R. No. 209/9358 was originally registered in the name **Yekoyada Francis Omoto Masakhalia** and **Isaiah Kitonga Mutuku**, the appellants herein under *Registration of Titles Act* (RTA) as tenants in common in equal shares. By *Civil Case No. 59 of 1991*, Nairobi City Council (1st respondent) sued the two appellants in Resident Magistrate's City Court to recover arrears of rates amounting to 65,770/= upto 1989. The record of appeal does not contain proceedings in the City Court to show exactly what happened in the suit. It seems however, that the two appellants allegedly failed to

attend the hearing and as a consequence, an *ex parte* judgment was entered against them. By a notification of sale dated 4th October, 1994, the 1st respondent advertised the suit property for sale by public auction on 21st April, 1995 to recover the decretal sum of Shs.174,099/25. By a letter dated 21st April, 1995 M/s. Capitol Auctioneers certified to M/s. Meenye & Co. Advocates (1st respondent) that the suit property was on 21st April, 1995 sold to **Stephen Waigwa Murage** and **Simon Mbogo Muchiri** as the joint highest bidders for Shs.1,100,000/= at a public auction held on 21st April, 1995.

By an order dated 13th July, 1995, the City Court made the sale of the suit property absolute and issued a certificate of sale dated the same day. Thereafter the purchasers filed *High Court Miscellaneous Civil Case No. 974 of 1995 (O.S.)* for a vesting order and the superior court (Aluoch, J.) granted a Vesting Order on 25th September, 1995. By a Transfer dated 18th June, 1996, the purchasers in turn transferred the suit land to **James Wahome Gituro** (4th respondent herein) (2nd purchaser) for Shs.1,200,000/= which transfer was registered on 16th July, 1996. The 4th respondent subsequently charged the suit land to Prudential Bank to secure a Shs.5,000,000/= advanced to him.

By a plaint dated 17th June, 1996, the two appellants filed *H.C.C.C. No. 1461 of 1996* against the 1st respondent; its Advocates, the two original purchasers and another for nullification of sale and damages on grounds of alleged fraud. There is no information on the current state of that suit.

On 12th July, 1996, the two appellants filed a Chamber Summons in *Resident Magistrate's City Court Civil Case No. 59 of 1991* under **Order 1XB Rule 8** of the *Civil Procedure Rules (CPR)* for setting aside the judgment entered in favour of 1st respondents on the ground that appellants were never served with a hearing notice. On 3rd February, 1996, the advocates for the 1st respondent and the advocates for the 2nd appellant filed a consent letter dated 30th January, 1997 before the R.M.'s City Court – to the effect that *ex parte* judgment be set aside by consent. The 2nd purchaser (4th respondent) filed two applications, the first dated 4th February, 1997 for leave to be joined as an interested party, and the second dated 17th June, 1997 for an order that the consent letter be set aside. It seems that the applications were heard together and by an order given on 20th November, 1997 the R.M. City Court granted two substantive orders, namely:

“1. THAT the sale of LR 209/9358 and all subsequent orders are a nullity.

2. THAT the *ex parte* judgment entered in this Honourable Court and all consequential orders are set aside”.

The ruling of the court is omitted from the record. It is not clear whether the application by 2nd purchaser to be made a party was allowed. Subsequently, the two appellants filed a Chamber Summons in *H.C. Miscellaneous Application Case No. 974 of 1995 (O.S.)* seeking an order to set aside the Vesting Order and a further order to register the appellants as the proprietors of suit land on the main ground that the superior court erred in law in granting a vesting order *ex parte*.

The superior court in its ruling dismissing the application made findings, *inter alia*, that, there was no error apparent on the face of the record to warrant a review of grant of Vesting Orders; that the original owners (*i.e. appellants*) were aware of the suit instituted against them for recovery of arrears of rates and of the advertisement of their property for sale; that the legal procedures and steps were followed in the advertisement and sale of premises; that the two original purchasers were *bona fide* purchasers for value without notice; that it was not necessary to cause the application for a vesting order to be served on the original owners because the sale had already been confirmed and made absolute by the court; that the original owners who had notice of sale of the property took no steps to stop it or otherwise; that suit property was rightly vested on two purchasers, and, that the third party (2nd purchaser) was also an innocent purchaser for value. Regarding the consent order recorded in the R.M.'s City Court on 20th November, 1997, the superior court said:

“I find that the consent order recorded on 20.11.97 nearly 2 years after the sale had been conducted was recorded in error and in my considered opinion, was of no effect. It did not take into account the rights of the purchasers. It did not even care to find out what had happened to the suit premises since the sale on 21.4.95”.

The 3rd respondent Samson Mbogo Muchiri died on 21st October, 2001 during the pendency of the appeal and at the hearing of the appeal an order for abatement of the appeal against him was made, his legal representatives having failed to make an application to be joined as a party within the stipulated time.

There are nine grounds of appeal but two main grounds argued by Mr. Kaluu, learned counsel for the appellants are, firstly, that the vesting order having been made against the rules of natural justice, is a nullity, and, secondly, that since the R.M.’s city court had set aside the judgment by consent and had declared the sale of the suit premises a nullity, the vesting order could not stand as the substratum upon which it was founded had disappeared.

It is expedient to consider the 2nd ground – that is the status of the consent order recorded in the R.M. City Court on 20th November, 1997 and its effect, if any, on the vesting order granted by the superior court on 25th September, 1995. It was contended by the appellants’ counsel that vesting order could not lie after the R.M.’s City Court set aside the *exparte* judgment. On the other hand, Mr. Masinde, learned counsel for the 2nd respondent submitted that the 2nd respondent was not a party to the consent letter to set aside *exparte* judgment and that the *exparte* judgment was set aside long after the vesting order was granted.

On her part, Miss. Mate, learned counsel for the 4th respondent submitted that the appellants have not sought an order for cancellation of the title, and that the court cannot cancel the 4th respondent’s title on its own motion.

The application to set aside the *exparte* judgment was filed in the City Court on 12th July, 1996 more than one year after the City Court had made the sale of the appellants’ land in satisfaction of a decree absolute and after the City Court had granted a certificate of sale in accordance with the law. The consent letter dated 30th January, 1997 on the basis of which the *exparte* judgment was set aside was signed by advocates for the 2nd appellant and advocates for 1st respondent. The first two purchasers (2nd and 3rd respondents) and the 2nd purchaser (4th respondent) were not a party to the consent letter. It was highly irregular for the City Court to act on a consent letter when the purchasers who were indeed the rightful parties had not been involved.

More importantly, whereas the application was for an order to set aside the *exparte* judgment and for stay of execution of all consequential orders, the City Court, in addition, granted an order that was not prayed for, that the sale of the suit land and all subsequent orders were a nullity. We respectfully agree with the superior court that the orders granted were ineffectual because by the time the orders were granted on 20th November, 1997 the two purchasers at the public auction were not only already registered as proprietors but they had also transferred the land to the 4th respondent who had in turn charged the property to the bank to secure a loan.

Moreover, it is only the High Court which has jurisdiction to rectify the register in respect of land registered under RTA (see definition of “Court” in **Section 2** of that Act). If the order was intended to nullify both the vesting order and the registration of the purchasers as proprietors, then, the order was made without jurisdiction and is itself, a nullity. It follows therefore, that the order of the City Court setting aside the *exparte* judgment and nullifying the sale had no effect either on the vesting order or on the subsequent registration.

Regarding the first ground of appeal, Mr. Kaluu submitted, *inter alia*, that the application for a vesting order was made *exparte* without serving the appellants; that if the application was served, the

appellants would have made representations to court; that a vesting order issued *ex parte* is a nullity and that this was an error on a substantial point of law, and, that, such an error is considered as an error apparent on the face of record and supports an application for review. He relied on **Adonia vs. Mutekanga** [1970] EA 429, a Uganda case, where it was held, among other things, that the proceedings for a vesting order must be served on the registered proprietor if living, and, that a vesting order made *ex parte* is void.

That case concerned succession to the estate of a deceased person in Mailo Land. The respondent Mutekanga had been selected as heir and guardian of the substantial estate and had been registered as proprietor of the estate for himself and as a trustee for other beneficiaries. Subsequently in proceeding between the appellant **Adonia** and one **Yonasani** as head of the clan a scheme of distribution was made by a subordinate court which scheme of distribution gave **Adonia** the suit land. On appeal to the High Court the scheme was approved by order of 31st May, 1954. Thereafter **Adonia** applied for a vesting order under the Uganda, *Registration of Titles Act* to obtain a registration in Mailo Register. The Vesting Order was granted under **Section 174** of the Act (that is to say, it treated the registered proprietor, the respondent, Mutekanga, as having held the land as a trustee for the appellant – **Adonia**). Later **Adonia** sub-divided the land into two portions and sold one portion and the sale was perfected by registration. The respondent later filed an application to set aside the vesting order in respect of both sub-divisions. The application was allowed in respect of both sub-divisions by the High Court on the ground that the application for a vesting order was not made against the respondent, the registered proprietor but against the head of the clan. On appeal to the Court of Appeal for Eastern Africa, the Court rejected the argument that the vesting order was a mere formality to enable registration and which could properly be made *ex parte*, and, also, rejected the further argument that even if it had been wrong to make it *ex parte*, there was no reason to set it aside, since it merely, gave effect to an order which was final and conclusive. On this submission Spry, J.A. with whom the members of the Court concurred said in part at page 433 paragraph E:

“It seems to me that without service on the registered proprietor, there could have been no jurisdiction to make a vesting order. The order made is therefore, in my opinion a nullity”.

Spry, J.A. however immediately qualified that remark by saying in paragraph F of the same page.

“If the vesting order had been made in a suit or on an application as may be appropriate with the respondent, Mutekanga as defendant or respondent, no difficulty would have presented itself. The order would have been made under Section 174 and would not have offended against Section 185. The doctrine of estoppel by record would probably have been invoked and might have succeeded, although it is unfortunate that respondent Mutekanga was not a party to the proceedings which culminated in the order of 31 May 1954”.

The Court of Appeal dismissed the appeal as it related to the unsold plot but set aside the order of the High Court as it purported to relate to the sold plot on the ground that the order purported to divest the registered proprietor (purchaser) of his estate without his being a party to the proceedings.

The circumstances of that case are similar to this case to the extent that **Adonia** applied for a Vesting Order after the High Court had confirmed him by an order of 31st May, 1954 as heir of part of the estate which was the subject matter of the application for a vesting order. The facts of that case are however distinguishable in some respects. Firstly, the proceeding in **Adonia** case related to transmission on death. In the present case, the proceedings related to sale of land in satisfaction of a decree of the court where *Civil Procedure Rules* have made elaborate provisions to regulate the attachment, objection proceedings, sale, setting aside the sale, and, ultimate confirmation of the sale or otherwise.

In this case, the appellants were parties to the suit and could have applied to set aside the sale before it was confirmed by the court. It is clear from the affidavit sworn by the 2nd appellant in support of the application to set aside *ex parte* judgment that he saw the advertisement of the suit premises for sale in the press. This is unlike in **Adonia’s** case where the respondent was not a party to the proceeding in the High Court where final orders were made on 31st May, 1954. With respect, we do not understand **Adonia**

case as laying down an inflexible rule of law that an application for Vesting Order must be served on the registered proprietor in all cases and that in the absence of service the vesting order granted is a nullity. Indeed, the court qualified the proposition. We are of the view that there are circumstances which may give rise to estoppel by record, waiver of right to service or other circumstances that may justify the granting of a vesting order exparte. Moreover, we are not certain that the statute law applied in **Adonia** case is the same as the applicable laws in Kenya. In our case, it seems that the Vesting Order was granted under **Section 48** of the Trustee Act (Cap 167) and not under RTA. We are satisfied that the reasons given by the superior court to which we have referred, justified the granting of Vesting Orders exparte.

Even if we were to agree with the appellants that the Vesting Order granted to the two purchasers was void and should be set aside, that would not help the appellants because it still leaves the registration of the second purchaser (4th respondent) as proprietor intact. In our view, the vesting order was superseded by the subsequent sale of the suit land to **James Wahome Gituro** who was subsequently registered as proprietor on 16th July, 1996. The title of the 4th respondent is protected by **Section 23** of RTA and cannot be taken away otherwise, than through a suit to recover the land and in which he is a party. Like in **Adonia's** case, his title cannot be taken away through an application to set aside the vesting order in which he was not a party.

Lastly, the appeal would not have been allowed because the suit land no longer exists on the register and in its original form. The Abstract of Title dated 7th June, 2010 shows that the suit land was sub-divided into three separate sub-titles with approval of Nairobi City Council, namely, L.R. No. 209/9358/1 which was surrendered to the Government in exchange for sub-division and L.R. Nos. 209/9358/2 & 3 which were registered in the name of 4th respondent on 26th November, 2001.

For those reasons, the appeal is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 16th day of July, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR