REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 104 OF 1996

MR AND MRS OKOTH OCHEYO..... APPELLANTS

AND

AZIZA MOHAMMED KONDE)

PRIESTLY JULIUS KONDE)..... RESPONDENTS

(Appeal from the ruling of the High Court of Kenya at Nairobi (Hon. Justice D.K.S. AGANYANYA delivered on 26th July, 1995 in H.C.C .C. NO. 1692 OF 1995
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JUDGMENT OF THE COURT

The facts giving rise to this appeal are that Aziza Mohamed Konde (the 1st respondent) is the wife of Priestly Julius Konde (the 2nd respondent). On 7th November, 1991 the second respondent sued the 1st respondent in the High Court of Kenya at Nairobi in Separation Cause No. 110 of 1991 for an order for separation from her. At all material times the 2nd respondent was the registered owner of the premises known as Nairobi/Block 32/1099. (the suit premises)which happened to be the matrimonial home of the two of them. On 13th January, 1993 a consent order was recorded in the said separation cause to the following effect:

"1.That the 2nd respondent do leave the matrimonial home forthwith.

2.That the 1st respondent be and is allowed the custody of the children.

3.That the 2nd respondent do pay to 1st respondent Kshs.4000/= per month for maintenance for herself and the children of the marriage commencing from 9th August 1992.

4.That the 2nd respondent do provide for the educational facilities of the children...

5.That the access to the children do remain unlimited.

6.That if the 1st respondent leaves the children (illegible), the 2nd respondent will immediately make arrangements to

provide for the children..

7.The present tenant of the servants quarters be given 3 months notice to vacate the premises.

8.That servants quarters of the suit premises do remain vacant.

9.That all these orders do remain in force until the hearing of the petition for separation."

Subsequently, by a letter dated 31st August, 1993, the 2nd respondent, through his advocates requested the Ist respondent to move out of the main house to the servants quarters so that the main house could be let out in order to service the loan which he had obtained from his former employers namely the Co-operative Bank of Kenya, Nairobi. By a letter dated 14. 9. 1993 the Ist respondent, through her then advocates, wrote in reply to the said request that the period given to her to move out from the main house was quite short particularly as she had several household effects which could not be accommodated in the servants quarters. Thereafter the 2nd respondent wrote to her, through his advocates letter dated 28.1. 1994, that unless she immediately moved out from the house he would have no alternative but to arrange for a private sale of the suit property.

By a caution registered on 17th November, 1993 the Ist respondent claimed interest as licensee in the suit premises and forbade the registration of dealings and the making of entries in the register relating to the title of the suit premises on the grounds that she was the wife of the registered proprietor of the suit premises; that she was living with three children of the marriage in it; that she had heard from her neighbours that her husband intended to sell the suit premises and that if the same was sold, she and her children would suffer greatly.

By a letter dated 17th November, 1993, the Land Registrar Nairobi notified the 2nd respondent that the Ist respondent had lodged the caution and that its effect was that no dealing with the suit premises could be registered without her consent or until the caution was removed.

Thereafter the spouses met on or about Ist August, 1994 and agreed inter alia that the Ist respondent should vacate the main house and shift into the servants quarters; that she should look for a tenant of the main house and out of a part of that rent, the loan taken from the Co-operative Bank should be serviced. In pursuance of that arrangement the Ist respondent moved into the servants quarters and let the main house on rent. She has been collecting the rent of the main house and in fact she is collecting it even now. She paid a sum of Shs.50000/= to the said bank on 25th October, 1994 and another sum of Shs.30000/= on 24th February 1995.

However by an agreement dated 6th December 1994 the 2nd respondent agreed to sell the suit property to Alfred Okoth Ocheyo and Catherine Susan Odero (the appellants) for Shs.1, 950,000/=. The transfer in favour of the appellants was registered on 31st December, 1994 which happened to be a saturday. Consequently the Ist respondent sued 2nd respondent and the appellants in the superior court for an order of a permanent injunction restraining them from any dealings with the suit premises until the determination of the said separation cause which is still pending in the superior court.

She also prayed for an order to nullify the registration of the said transfer in favour of the appellants and for an award of damages. In her plaint she had pleaded inter alia that her caution had been illegally removed without her consent or authority and that the sale of the suit premises had been obtained by way of fraud infringing on her rights under the said caution.

Along with the plaint, the Ist respondent applied for an interlocutory injunction restraining the appellants from evicting her and her tenants from the suit property until the finalisation of her suit and the determination of the separation proceedings. She also sought an order to restrain the 2nd respondent from receiving any rent from the suit property and for the status quo to be observed by the parties until the finalisation of the said proceedings for separation. We have noted with concern that although the suit was filed by the Ist respondent on 31st May, 1995 the summons to enter appearance has not been served so far. Mrs Ngala who appeared in this appeal for the Ist respondent could not give us any satisfactory explanation for the non service of the summons. This smack of bad faith on the part of the Ist respondent. Coming back to her application, by an affidavit sworn on 31st May, 1995 in support of that application, the

Ist respondent deponed inter alia that by the said consent order the court allowed her to stay in the suit premises and that the said order was still in full force and effect. She further contended that the said caution was removed without her consent. She has also deponed that she visited the land office and was informed that she had herself sworn an affidavit requesting the land officer to remove the caution but the said affidavit could not be found in their file and had not been traced so far. She believed, that her signature on that affidavit was "fraudulently fixed".

On 26th July, 1995 Aganyanya J. held that the Ist respondent had established a prima facie case with a probability of success and that as the Ist respondent was the one residing in the suit premises it was only fair that the status quo should be maintained until the final disposal of the suit before him. He granted the 1st respondent's application as prayed by her.

The appellants being aggrieved by that ruling and order of the superior court have appealed to this court. Their grounds of appeal can be summed up as follows:

(1)That the learned trial Judge failed to appreciate that the orders made in the separation cause did not restrain the 2nd respondent from selling the suit premises;

(2)That the learned Judge erred in law and fact in not finding prima facie that the appellants were bona fide purchasers for valuable consideration without notice of the 1st respondents claim or interest, if any, in the suit premises;

(3)That the learned Judge erred in law and in fact in holding that the caution had been illegally removed and

(4)that the learned Judge erred in law in finding that it was fair in the circumstances of the case that status quo should be maintained until the final determination of the suit.

The cumulative effect of the above mentioned first 3 grounds is to challenge the learned Judges holding that the 1st respondent had established a prima facie case with a probability of success. The 2nd respondent cross appeals on the grounds which are similar to those upon which the appellants have appealed. The 1st respondent has filed a notice of affirmation of the said decision of the superior court on the grounds that the 2nd respondent acted dishonestly and in bad faith in proceeding with the sale of the suit premises which was the matrimonial property and that the appellants colluded with the 2nd respondent in the commission of that fraud as they must have viewed the suit premises and knew that the second respondent's wife was staying there and must have known about the existence of the caution which was allegedly fraudulently removed and that the appellants was not a bona fide purchaser.

On an appeal which turns on a question of fact, the court must reconsider the materials before the Judge and make up its own mind not disregarding the decision appealed from but carefully weighing and considering it and not shrinking from over-ruling it if on full consideration it comes to the conclusion that is wrong (per Lindley M.R. in Coghlan vs Cumberland [1898] 1 Ch.704. But the appellate court will interfere with the discretion of the trial Judge only where it is satisfied that he exercised his discretion under a mistake of law or on wrong

principles of law or under a misapprehension as to the facts or that he took into account irrelevant matters or failed to exercise his discretion at all or that his order would result in injustice. As this appeal is from an interlocutory order and the suit is still pending, our views in this judgment are prima facie.

The gravamen of the 1st respondents argument in the superior court was as we have already said that by the said consent order made in the separation cause she was allowed to stay in the suit premises until the hearing of that cause and that as the said cause was still pending, the 1st respondent could not be dispossessed of the suit premises. However at the moment the 1st respondent occupies the servants quarters only whereas the main house of the suit premises is let to a tenant. As we have already said, 1st respondent voluntarily moved into the servants quarters in order to make way for the main house to be let out so that from its rental income the loan which the 2nd respondent had taken from the co-operative bank could be serviced.

The said consent order does not restrain the 2nd respondent from selling the suit premises during the pendency of the said separation cause. By paragraph 5 of her plaint, the 1st respondent concedes that the suit premises are

registered in the name of the 2nd respondent. The first respondent has not claimed any proprietory interest in the ownership of the suit premises.

The said consent order was an interim order whereby the 2nd respondent agreed to move out from his property, presumably in order to keep peace between him and his wife pending hearing of the separation cause. The order does not expressly say that the 2nd respondent could not require the 1st respondent to vacate the suit premises in case he wanted to sell them during the pendency of the separation cause. Moreover apart from the object of keeping peace between the parties, it seems that the said order was meant to be an interim measure to provide for the maintenance of the 1st respondent and her children, the custody of the children and the right of access to the children until the hearing of the said cause.

The learned trial Judge in the course of his ruling said:

"On 17th November, 1993 she lodged a caution against the title claiming a licensee's interest therein. But just within a month(s) on 22nd December, 1993 this caution was removed. The Plaintiff/applicant says she was not notified of this removal. From the fast manner the said caution was removed from the record, the Plaintiff/applicant may well be right that she was never notified of the removal as required under the relevant Act."

However certified copy of the land register at page 68 of the record shows that the caution was lodged on 17th November 1993 but it was removed on 22nd December, 1994 and not 22nd December 1993 as the learned Judge mistook it. Thus the learned Judge misdirected himself that fast speed of removal of the caution in just about a month's period was an indication that the Ist respondent could be right in saying that she was never notified before the removal of the caution as required by the Act.

The record shows that the transfer in favour of the appellant was registered on 31st December, 1994 which was a saturday when government offices are usually closed. However we agree with Counsel for the appellants that that is a matter for the Land Registrar to explain at the trial of the suit. That lapse in itself cannot be tantamount to proof of collusion between the 2nd respondent and the appellant.

According to the Ist respondent she had been informed by the officers at the land office that by an affidavit sworn by her, she had consented to the removal of the caution from the land register. But that alleged affidavit could not be traced in the file of the land registrar when she required them to produce it for her perusal. Her belief therefore is that her signature was fraudulently fixed on that missing affidavit.

The true copy of the land register at page 68 shows that on 16th June, 1995, the land registrar placed a restriction prohibiting the registration of any dealing relating to the title of the suit premises until an allegation of forgery was investigated. Although it is now more than two years since then there is no evidence that the intended investigations have ever been even commenced. In any case there is no evidence of collusion or complicity on the part of the appellants in the commission of the alleged forgery.

Under section 27 (1) of the Registered Land Act (the Act) subject to the provisions of the Act the registration of a person as the proprietor of land vests in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto. Also under S.28 of the Act the rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration shall be the rights not liable to be defeated except as provided in the Act. There is no evidence, not even an allegation in the plaint, that the suit premises were transferred without any valuable consideration. Thus, in the circumstances of this case, we find it difficult to sustain the learned trial Judge's finding that the Ist respondent had established a prima facie case with a probability of success against the appellants.

The learned trial Judge also held:

"Even on balance of convenience it is the plaintiff applicant who has been residing in the suit plot and that it is only fair that the status quo be maintained until the hearing and final disposal of the suit."

There is, however, uncontradicted evidence that the Ist respondent is in occupation of the servants quarters only. She

no longer resides in the main house though she still collects its rent and pockets it. The other side of the coin is that as page 50 of the record shows the appellants have borrowed a sum of shs.750,000/= from the Housing Finance of Kenya Limited on the security by way of a first charge on the suit premises. Ever since they bought the property some 3 years ago, they have been kept out of the rental income of the property. They complain that without the rental income of the property, they are not able to service the loan and consequently they run the risk of losing the suit premises as the chargees might dispose of the same exercising their statutory power of sale. Moreover unless and until the court grants rectification of the register under S.143(2) of the Act, the appellants should be entitled under S.27(2) of the Act to all rights and privileges belonging or appurtenant to their being registered as the owners of the suit premises. Also, the Ist respondent no longer resides in the main house.

Yet without claiming any proprietary interest in the suit premises she continues to collect and pocket the rental income of the main house. So, on balance of convenience, it is only just and fair that the appellants should be forthwith entitled to collect the rental income of the main house of the suit premises.

The Learned Judge issued an injunction restraining the 2nd respondent his servants and agents from receiving any rent from the suit premises until the determination of the suit. Little did he realise that the 2nd respondent having transferred his right title and interest in favour of the appellants is not entitled at all to collect any rent and nor has he ever threatened to do so. As we have already said, it is the entitlement of the appellants by virtue of their being the registered owners of the suit premises to collect the rental income of the same.

The most, therefore, the Ist respondent could seek from the court on balance of convenience was that she should not be evicted from the servants quarters in which she had been residing since the institution of her suit. That was, with respect, the status quo which the learned Judge should have ordered to be maintained until the final determination of the suit.

In the end, we allow the appeal, and hereby set aside all the orders made by the learned Judge and hereby order instead that the appellants shall be entitled forthwith to collect the rental income of the main house of the suit premises. We further order that the Ist respondent shall be at liberty, without any let or hindrance from the Appellants, to continue to reside in the servants quarters of the suit premises until final determination of the suit.
We award two thirds costs of this appeal to the appellants against the 1st respondent and also order that the 1st respondent will pay two thirds of appellants costs of the Chamber Summons in the superior court. We make no order as to the costs of or against the 2nd respondent.

Dated and delivered at Nairobi this 18th of December 1997.

A.M. AKIWUMI

.....
JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

G.S. PALL

.....
JUDGE OF APPEAL

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

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