



REPUBLIC OF KENYA

IN THE HIGH COURT OF EKNYA AT ELDORET

CIVIL APPEAL NO. 75 OF 2014

(Being an appeal arising from Eldoret Chief Magistrate's Court in Civil suit no. 412 of 2006 delivered by Mbogo C.G. - Chief Magistrate on 8/5/2014)

JOTHAM NYONGESA KARANJA APPELLANT

VERSUS

INDUSTRIAL AND COMMERCIAL DEVELOPMENT

CORPORATION.....RESPONDENT

J U D G M E N T

1. The issues in this appeal are very clear. The appellant took out a loan facility amounting to Kshs 10,000/= in the year 1975 from the Respondent. In the year 1983, the appellant defaulted and the land known as **North Kabras/Luandeti/1039 measuring 3.8 acres** was sold through public auction.
2. Two suits were subsequently instituted namely Kakamega SRM Civil Case No. 751 of 1984 between Edward Osolika Ndombi Vs the Applicant and Miscellaneous Application No. 126/1998.
3. In all the matters the appellant lost all the way to the Court of Appeal. The exhibits of the courts proceedings state as much.
4. Although the Respondent filed its defence IT did not call any witness but chose instead to submit. The trial court dismissed the appellant's suit citing inter alia that the same breached the provisions of Section 27 and 28 of the limitations of Act Act.
5. Secondly that the Statutory notice given to the appellant was sufficient and thus the sale was lawful. Even more important is the fact that there was non inclusion of the authorities in the suit.
6. I have carefully read the proceedings at the trial court, the decision of the court, the exhibit produced as well as the submissions made herein in support and opposition to the appeal.
7. Clearly this court is enjoined to re evaluate the evidence afresh and arrive at an independent decision.
8. It shall be worthwhile in my view to determine one central legal issue touching on the suit, namely whether the same was time barred.
9. It is not disputed that the same was filed 23 years after the incident. Contrary to the findings of the trial court the applicant sought the leave of the court to institute the suit.
10. Does this mean that the leave so granted validated the suit? Did it cure the time factor? I respectfully do not think so. First of all the leave application is always granted exparte. It is not tested by way of cross-examination or challenged by way of a replying affidavit. Sometimes it is granted as a matter of course.
11. The court held in *Yunes Onita Vs Samuel Mose Nyamato CA Civil Appeal No. 96 of 2004 (UR)*, that the same can be challenged.
12. In *Mary Wambui Kabuga Vs Kenya Bus Services Ltd Civil Appeal No. 195/1995 (1997) eKLR* Akiwumi J. expressed himself that;

“ It must be remembered that even when the Judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity to challenge the facts and the law afterwards at the trial. The Judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the

least bound by the the provisional view expressed by the Judge in chambers who gave leave.”

13. Clearly therefore for whatever worth the leave was granted it was bound to have been challenged. I think then the trial court was at fault to suppose that the same had not been granted.

14. Did the said extension of time validate the appellant claim? I do not think so. The following provisions of the Limitation of Actions Act Cap 22. Militates against the appellant's claim whichever way it is read, namely Section 4 dealing with contracts which must be enforced within a period of 6 years, Section 7 on recovery of land as well as Section 19 thereof. Neither does he benefit from Section 22 which deals with a person under disability for there was no evidence shown to the trial court that he suffered from such.

15. Even if this appeal was to succeed, the absence of other key stake holders in the process would render the suit superfluous. The people who should have been included as the necessary parties are the Auctioneer who sold the property under the instructions of the Respondent. Equally important is the purchaser who bought the same at the public auction. In the absence of the two, how can the applicant claim that the Respondent sold his land fraudulently and for that reason undervalued.

16. For the two legal reasons namely, the Limitation of time discussed above and lack of joinder of parties, I find that the suit would not have succeeded at the trial court even if the Respondent had called any defence witness. Needless to say and contrary to the appellant's assertion, it was the discretion of the Respondent to call or not to call its witnesses.

17. Without going into other grounds raised in the Memorandum of Appeal I find that the twin legal reasons given above are sufficient to dispose off this appeal. The same is hereby dismissed with costs to the Respondent.

Delivered, signed and dated at Eldoret in open court on this 19th day of October, 2018.

H.K. CHEMITEI

JUDGE

19/10/18