



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. NO. 10 OF 2016

ALBERT MAGU MUSA..... APPELLANT

-VERSUS-

SAMUEL KAGUNDU MUCHIRA.....1ST RESPONDENT

MOSES KIGUNDI KARURI.....2ND RESPONDENT

EDITH WANJA MURIUKI.....3RD RESPONDENT

SERIPHA MUTHONI NYAGA.....4TH RESPONDENT

JUDGMENT

1. The plaintiff **Albert Magu Musa** filed a case against the defendants **Samuel Kagundu Muchira, Moses Kigundu Karuri, Edith Wanja Muriuki** and **Seripha Muthoni** claiming general damages amounting to Ksh.141,420/= for the development which he had undertaken on plot No. 10 in which they were joint owners.

2. The defendants filed a defence and raised a preliminary objection in which they contended that the suit was time barred and *res judicata*. In a judgment by the trial magistrate in Civil case No. 25/2013 in the Senior Principal Magistrate's Court at Gichugu, the plaintiff's claim was dismissed for being time barred.

3. Aggrieved by that decision, the appellant lodged this appeal. He contends that the trial magistrate erred in law and fact due to the following:

i. In reaching a conclusion that the suit was time barred.

ii. In finding that the cause of action arose in 1986.

iii. In not finding that there was no nexus between the original defendants and the defendants in suit No. 25/2013.

iv. Not finding that the plaintiff's claim under Civil Suit No. 25/2013 should have proceeded to be heard on merits.

4. The brief facts of the appellant's case are that in the year 1951 – 1953, a number of people including the appellant's father, one **Musa Kamotho** owned **plot No. 10 Karumandi**. They later constructed two front rooms and started renting them out. Sometimes in the year 1970, the appellant rented one room and started a retail shop. The appellant's father passed away in 1956. The appellant's mother continued

getting a share of the rent after her husband's death. In 1985 the remaining plot owners allowed the appellant to develop the said plot and gave him a building plan. In 1986 the appellant embarked on construction and built two back rooms thereon. The appellant put up two back rooms and added another front room in 1993.

5. Later in 1993 the appellant was imprisoned for one year and upon his return he found that the plot had been sub-divided into three No. 10A, B and C. The appellant was allocated plot number C. The appellant's plot and all the developments he had carried out fell on plot A. This was done in the year 2012. The respondents did not compensate the appellant for his extensive investments thereon.

6. The appellant had filed Civil suit No. 25/2013 based on these facts. The suit was dismissed for being statute barred.

7. The respondents' contention is that the appeal has no basis as the suit was statutory time barred as the cause of action had arisen in 1986 and not in 2012. It is further contended that this is a claim for money and therefore a tort and the trial magistrate was right to find that there was no cause of action as the limitation time had long expired and proceeded to dismiss the suit altogether as it was a waste of court's time as it was also *res judicata* owing to the various suits earlier on dismissed.

8. There are three issues which arise for determination from the submissions.

- When did the cause of action arise?
- Was the suit before the trial magistrate statute barred?
- Was the suit *res judicata*?
- Is the record of appeal complete?

9. The appellant's claim was in the plaint filed in Civil Suit No. 25/2013. At paragraph 4 of the plaint which is at page 6 of the record, the appellant averred that in 1986 during the joint ownership of the said plot the plaintiff had developed two rooms at a cost of Ksh.100,000/= and paid land rates of Ksh.5420/=. At paragraph 5, he states that in 1994 the plot was sub-divided by the defendants into three portions described as ABC and they took up plots A & B on which the two rooms constructed by the plaintiff lay. On or about January 2012 the defendants sold the said portions A & B without compensating the appellant of the development he undertook in the said land portion. At paragraph 7 he claims two lorries of stones, 2 lorries of ballast at the costs of Ksh.20,000/= and 16,000/= respectively that lay in the said land portions A and B. At paragraph 10 he claims a sum of Ksh.141,420/= interests and costs.

10. From these pleadings it is clear that the appellant is claiming money which he spent on developing the plots. It is clear from his pleadings that the developments were carried out in 1986.

11. From the pleadings, the events of 2012 do not constitute the date when the cause of action arose. The appellant sued the defendants for failing to compensate him of the developments he undertook in the said plot. It is clear from the plaintiff's pleadings that the cause of action arose in 1986 when he alleges he put up developments on the said plot.

12. In the pleadings by the defendants at paragraph 9 of the defence, they alleged that the suit was *res judicata* as the defendant had sued over the same subject matter. In their documents the defendants annexed Nyeri CMCC 321/1995 which was transferred to the Kerugoya Court through a miscellaneous application No. 209/1995. The file at Kerugoya was R.M.CC 168/1997.

13. The plaint in Civil Case No. 321/1995 which was between the appellant Albert Magu Musa Versus Mukora Nyaga and others at paragraph 5 the appellant stated that his claim is for a sum of Ksh.100,000/= being the costs of the building constructed by the plaintiff. He also claimed special damages of Ksh.5420/= which he has spent on defendants' account while paying the County Council rates. This plaint is dated 22nd May, 1995 and filed in Court on 23rd May, 1995.

14. It is very clear that the same claim the appellant filed in 1995 is the same claim he has filed in 2013.

There can therefore be no dispute as to when this cause of action arose. If the appellant could file a claim in Court in 1995 seeking the same orders, he cannot turn around and say the cause of action arose in 2013. It is a mark of dishonesty and a clear abuse of court process. The facts are glaring that this cause of action arose in 1986 when the appellant states he was given consent to develop the plot and a plan on how to effect the developments. I am of the view the submissions by the appellant that the cause of action arose in 2012 cannot be upheld. The claim by the appellant is not about the unlawful disposal of the plots by the respondents. His claim is very specific. I hold that the cause of action arose in 1986 about twenty seven years before the suit was filed in 2013.

15. I now deal with the issue of limitation. The appellant claims a liquidated sum of Ksh.100,000/=, special damages of Ksh.5420/= and cost of materials left at the site. This interprets to a claim for money owing. It becomes a civil debt. The appellant was entitled to claim the debt from the respondents within a period of six years. The first suit was filed in 1995, nine years after the cause of action arose. The definition of cause of action in Wikipedia is as follows:

“In law, a cause of action is a set of facts sufficient to justify a right to sue to obtain money, property, or enforcement of a right against another party. This term also refers to the legal theory upon which a plaintiff brings a suit (such as a breach of contract, battering or false imprisonment).”

Thus a cause of action can arise from an act, a failure to perform legal obligation, a breach of duty, a violation or invasion of a right. The appellant claims he had a cause of action against the respondents. It is clear from the pleadings how and when it arose. He claims he was to be compensated for developments on the plot. He ought to have filed the claim within six years. **Section 4 (1) (a) of the Limitation of Actions Act Cap 22 Laws of Kenya** provides:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued – actions founded on contract.”

From the record, the appellant in filing a suit in 1995 was stating that he had a cause of action against the respondents founded on an agreement for him to carry out development and the respondents to in turn compensate him. That same claim could not be within time in 2013. The claim filed in 2013 was clearly filed out of the limitation period. The appellant never sought leave to file the suit out of time as provided under **Section 26 of the Limitation of Actions Act Cap 22 Laws of Kenya**. I am of the view that the trial magistrate was right to hold that the suit was statute barred. Based on these findings, ground No. 1 and 2 must fail. The appellant has tried without success to mislead the court that the cause of action arose in 2012. The suit was statute barred.

16. Having found that the suit was statute barred, the trial magistrate was not obliged to order the case to be heard on merits. In the case of **Mukisa Biscuits Manufacturing Co. Ltd. (1969) E.A. 696** it was held:

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit.”

What was argued before the trial magistrate was a point of law. It was argued successfully with the effect that the suit was dismissed.

17. In the persuasive decision by Justice Olao in **Dorcas Muthoni Karani and 2 others -V- Johnson Wachira Kabui and three others ELC case No. 9/2012, Kerugoya**, the Court dismissed the suit where the claim was filed outside the limitation period and the party had not applied for extension of time under **Section 6 of the Limitation of Actions Act supra**. A suit which is statute barred cannot proceed to be heard on merits. Laws are not passed in vain. Litigants have an obligation to file suits in compliance with the law on limitation or risk having the suit dismissed. I find that ground four is without merit and is dismissed.

18. Turning to ground No. 3 the trial magistrate erred in law and in fact in not finding that there was no nexus between the original defendants and the defendants in civil suit No. 25/2013, no submission was made by the appellant on this ground. This issue was not raised before the trial magistrate. The trial court stated that the defendants in the initial case are ideally not the defendants in the current case. This is what the trial court had to say:-

“The defendants in the initial case are ideally not the defendants in the current case. But is there a nexus between them, and the current defendants? From the documents filed herein, it is clear that the current defendants derived from them beneficial interest on the subject properly as heirs or successors to the defendants in their previous suit.”

She went on to state that the plaintiff had sued the current defendants in the same capacity as he had sued the other defendants. In the end the court found that the suit was not *res judicata*. It is my view that the trial magistrate showed there was a nexus between the original defendants as the current defendants are heirs and successors. This ground therefore lacks merits.

19. The issue of whether the suit was *res judicata* was also raised. **Section 7** of the **Civil Procedure Act** deals with the issue of *res judicata*. It provides:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

20. The appellant had filed Nyeri SRM CC 321/1995 which was transferred to Kerugoya vide Misc. case No. 209/1995. It was given No. 168/1997. The record of appeal at page 96 shows that this case was on 27th February, 2008 dismissed for want of prosecution.

21. For the case to be *res judicata* three conditions must be shown. That is to say:-

- i. That there is a former suit or proceeding in which the same parties in the subsequent suit litigated.
- ii. The matter in issue is directly or substantially in issue in the subsequent suit.
- iii. That a court of competent jurisdiction had heard the matter and finally decided the matter in controversy.

The suit No. 168/1997 was not heard and determined on merits. It was determined on a procedural technicality that is, dismissal for want of prosecution. Upon the dismissal of a suit for want of prosecution, a party has two options. The first is to apply to the court without unreasonable delay to have the suit reinstated. The second option is to file a fresh suit but bearing in mind the limitation period within which to file the suit.

22. The current suit, 25/2013 was not *res judicata* in the trial court before the decision of the trial court as suit No. 168/1997 was not heard and determined on merits. The provision above shows that the party can still file the suit afresh with leave of the Court if the suit is not time barred. Dismissal for want of prosecution does not amount to conclusive determination of the issue(s) in dispute and that is why the party whose suit is dismissed can reinstate it with leave of the Court or file a fresh suit. It may be *res judicata* upon the decision of this Court upholding the decision of the trial Magistrate or allowing the appeal and no appeal is filed. I uphold the decision of the trial magistrate. That suit No. 25/2013 was not *res judicata* before her.

23. It was the submission by the respondents that the list of documents filed on 3rd December, 2013 had no documents. The appellant has now annexed the documents in the record of appeal. The respondent contends that the documents which appear from page 10 - 25 of the record should be expunged. The

appellant submits that **Order 42 rule (12) (4)** of the **Civil Procedure Rules** provides for all the documents which forms the record of appeal.

24. The appellant submits that if a record leaves or omits documents, there is provision for supplementary record to remedy the omission but not striking out. They referred to the case of **Peter Mulaa Mutunga -V- Rubi Plastics Ltd (2013) eKLR** where it was held that an appeal cannot be struck out merely on grounds that there were missing documents. I have considered the authority which is persuasive and not binding. It was dealing with a totally different issue than what is raised before me. What is raised before this Court is that documents which were not in the record of the lower court have now found way in the record of appeal. **Order 42 rule 13 Civil Procedure Rules** provides for what should be in the record of appeal. It provides:

“1.....

2.

3.

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in possession of either party have been served on the party, that is to say

(a) Memorandum of appeal.

(b) Pleadings

(c) The notes of the trial magistrate at the hearing.

(d) The transcript of any official shorthand typist notes, electronic recording or pist’s notes made at the hearing.

(e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate.

(f)The judgment, order or decree appealed from and where appropriate the order (if any) giving leave to appeal.”

The appellant is alleged to have filed documents in the record of appeal which were not put in evidence before the magistrate. These documents are found at 10 to 25 of the record.

25. Order II rule 2 Civil Procedure Rules provides that a pre-trial questionnaire shall be filed within ten days of the close of pleading. **Order 3 rule (2) Civil Procedure Rules** provides that all suits shall be accompanied by *inter-alia* copies of documents to be relied on at the trial. The rules are couched in mandatory terms. The pre-trial question is mandatory component of documents before the trial court which should not be omitted from the record of appeal. Failure to include it in the record of Appeal was fatal. The pre-trial questionnaires was filed on 16th March, 2015. The appellant who was the plaintiff in the lower Court had filed a list of documents dated 3rd December, 2013. I have looked at the list of documents dated 3rd December, 2013. As submitted by the Counsel for the Respondent, the documents listed were not attached. In other words, the list had no documents. The record of appeal filed now has the documents which were listed on the list of documents but were not attached. The record also shows that there were pre-trial questionnaires which were filed on the record of the lower Court which are not in the record of appeal. The Appellant did not file any supplementary list of documents to include the documents which were not attached to the list dated 3rd December, 2013. These documents which never formed part of the documents before the trial Court appear in the record of appeal at page 10-12. The list of documents which the plaintiff filed on 1st April, 2014 did not have these documents found at page 10 –

12 of the record. There is non-compliance with the **Order 42 rule 13 Civil Procedure Rules** by sneaking in evidence which was not before the trial Court and omitting documents (pre-trial questionnaires) which were before the trial Court. This was prejudicial to the Respondent and documents not produced in the trial Court must be expunged from the record as admitting them at this time would amount to a miscarriage of justice. I direct that the documents at page 10 – 12 of the record be ex-punged.

26. The documents at page 13 – 25 were introduced through a list of documents filed in Court on 1st April, 2014. There were further documents which were dated on 15th December, 2014 and filed in Court on 27th January, 2015. The record shows that the trial magistrate gave leave to the parties to file a list of documents. The requirement to file the documents with the suit is a procedural one. **Article 159 (2) (d)** of the **Constitution** mandates Courts to do justice without undue regard to procedural technicalities. Furthermore **Section 1A** and **1B** gives Courts discretion to deal with the real issues in dispute. It is provided:

“Section 1A (1):

The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

1B (1) for the furtherance of the overriding objective specified in Section 1A the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

a. The just determination of the proceedings.

b. The efficient disposal of the business of the Court.

c. The efficient use of available judicial and administrative resources.”

27. Failure to file the documents at page 13 – 25 was cured when the Court gave leave to the parties to file further documents and witness statements. The documents were therefore properly on record.

28. In conclusion, I am of the view that the trial court was right to hold that the cause of action arose in 1986 and the suit being filed in 2013 was for all intents and purposes statute barred. The appeal is without merits. I dismiss it with costs.

Dated and delivered at Kerugoya this 17th day of November, 2017.

L. W. GITARI

JUDGE

Judgment read out in open Court, appellant present, 1st, 2nd, 4th respondents present, court assistant Naomi Murage this 17th day of November, 2017.

L. W. GITARI

JUDGE

17.11.2017