



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL CASE NO. 57 OF 2010.

WESONGA LUSAKA.....APPELLANT

VERSUS.

PHILIP KHAMALA JOSEPH.....RESPONDENT

JUDGMENT.

[1]. The brief facts of Civil Suit in 542'B' of 2002 before the Magistrate's Court at Bungoma were that one Joseph Lusaka Sirengo now deceased, and the father to the appellant and respondent subdivided his land parcel number W. Bukusu/S. Mateka/1542 with the intension of giving the resultant subdivisions to his sons among them the appellant and respondent herein. The Subdivision were consented to by the Kanduyi Land Control Board. The dispute before the Senior Resident Magistrate was, which portion was given to each appellant and the respondent herein. At the hearing before the Senior Principal Magistrate, the respondent had his title which he claimed to have obtained immediately after subdivision in 1992 while the appellant had no documents of title. The appellant plead fraud on the part of the respondent in obtaining the aforesaid title but tendered no evidence on the fraud. Each party called a number of witnesses to support their case. The learned Magistrate had no trouble in arriving at the conclusion that no fraud was proved on the part of the respondent in obtaining his title subject to challenge in Court and that the respondent had acquired the same property and his proprietary right under Sec. 28 of the Registered Land Act (in operation then) cannot be defeated.

[2]. It is against that finding that the appellant appeals to this court. He sets eight grounds of Appeal which can be summarized as follows;

- (a). That the court did not have jurisdiction in view of Sec. 159 Cap 300.
- (b). That the suit was time barred.
- (c). That parcel number W. Bukusu/S. Mateka/228 was obtained fraudulently and that the particulars of fraud were not considered.
- (d). That the amended Plaintiff was defective and that the claim did not specify when the cause of action arose.
- (e). That the Court should have called the evidence of the expert who subdivided the suit land.

[3]. The respondent has filed his submissions on each of the grounds. On jurisdiction, the respondent says that the appellant did not raise the issue of jurisdiction at the trial and that he is estopped from raising it now. He avers that the Jurisdiction sought being a monetary jurisdiction under Sec. 159 of the repeated RLA, he should have availed a valuation to prove the value of the land to show that he court had no

jurisdiction.

On the issue of limitation under Section 7 of the limitation of actions Act, he avers that the land subject to this appeal was registered on 25/5/92 and that the suit subject to this appeal was filed in October 2002 that, this was 10 years and it was within the statutory period required by law. On the issue of fraud, the respondent states that though the same was mentioned in the defence no particulars of fraud were set out and no evidence was tendered at the trial to support those allegations. On amendment of pleadings to indicate under what order the Plaintiff relied on, the respondent argued that this is a matter of substance and not form and the same is cured by article 159(d) of the Constitution, which mandates that Justice will be done to all without undue regard to procedural technicalities and finally, on calling of an expert, the respondent had averred that W. Bukusu/S. Mateka 2281 belonged to him and since it was the appellant that was alleging fraud, it was incumbent upon him to lay all necessary evidentially material to prove his claim and he failed to do so and that this appeal must fail.

[4]. Parcel W. Bukusu/S. Mateka 2281 was carved out of W. Bukusu/S. Mateka/1542. It was gift *inter vivo* by the registered owner Joseph Lusaka Sirengo the owner of 1542 who gave the same to one of his sons. The issue at hand was, which son was given. From the evidence of the respondent in the lower Court, It would appear that there was a dispute between Joseph Lusaka Sirengo and some of his sons who had placed a caution on his land. A case was filed as Civil Case Bungoma Magistrates Court No. 128 of 1988. The case was heard and the caution removed. The said Sirengo then was free to subdivide his land among his children and he told them that each was to stay on the land he was given. The appellant consented to the facts that they attended Land Control Board at Kanduyi. The board consented to subdivision and the land was subdivided and each son was given his share. He conceded that there was a case in 1988. It was obvious that one son did not go to his correct portion. The father died soon thereafter, a dispute arose and that is the genesis of this dispute. That is the dispute the learned Magistrate resolved and which is now subject to this appeal.

Analysis

[5]. On the issue of jurisdiction, I have no difficulty in finding that Sec. 159 of the repealed LRA was a monetary jurisdiction. This issue was not raised in the Court below, where the parties were all represented by Counsel. No valuation was ever produced to show the value of the land either in the Court below or in this court. The same cannot be sustained and it is dismissed.

[6]. The suit land herein W. Bukusu/S. Mateka/2281 was first registered on 25/5/92. This suit was filed in October 2002 to evict the appellant from the said land. The appellant had been on the same for 10 years since proprietary rights accrued to the Plaintiff respondents herein. The statutory period of 12 years had not elapsed. This ground of appeal has no merits and it is dismissed.

[7]. On grounds number 3 and 4 of the appeal, though particulars of fraud were set out in the amended defence dated 8th November 2002, none of the same was proved before the learned Magistrate. He was right in dismissing the allegation of fraud and I so find.

[8]. On amendment of the Plaintiff, I find that no prejudice or injustice was caused to the appellant, since he was able to file his amended defence therein. I find that the learned Magistrate considered the amended Plaintiff and the amended defence when arriving at his conclusion.

[9]. I find that it was not for the respondent to call the expert who subdivided this land. He was not making any allegation against the expert. It was for appellant, if he indeed required an expert to give evidence, to call him, and place such evidence before the court and not otherwise. The allegation that the Court should have called such expert is with respect, misplaced. This ground is also dismissed.

[10]. In the final analysis, I find that the learned Magistrate came to the right conclusion. I find no reason to interfere with his decision. I also find the authorities sighted by the parties not relevant to the circumstances of this case.

I dismiss this appeal with costs to the respondent.

Judgment read in open court in the presence of the parties.

Dated, Signed and delivered on 29th September, 2016.

S. MUKUNYA

JUDGE.

In the presence of:

Court Assistant – Joy

Mr. Murunga is for the Respondent

Miss Wakoli for Bw' Onchiri for the applicant