



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC APPEAL NO. 10 OF 2013

(Being an Appeal from the Judgment of the Honourable Kagoni E.M.Ag SRM delivered on 16th May 2013 in Kilifi PMCC No. 352 of 2011

KAZUNGU KARISA NGARI.....APPELLANT

=VERSUS=

JOHN OTIM OMARA.....RESPONDENT

J U D G M E N T

Introduction:

1. The Respondent herein was the Plaintiff in SRMCC No. 352 of 2011, Kilifi, while the Appellant was the Defendant.
2. In the Plaintiff that was filed by the Respondent in the lower court, the Respondent sought for an order of vacant possession in respect of land known as Kilifi/Mtwapa/1688 and survey fees of Kshs.10,000.
3. In the Judgment that was delivered on 20th August 2013, the learned Magistrate allowed the Respondent's claim as prayed in the Plaintiff.
4. The Appellant has challenged the decision of the learned Magistrate on the grounds that the learned Magistrate erred in law and in fact in holding that the Respondent's suit was not time barred; that the learned Magistrate erred in law and in fact in holding that the Respondent acquired the suit property procedurally; that the learned Magistrate erred by disregarding the Appellant's defence, evidence and submissions and that the learned Magistrate erred by delivering a Judgment in total disregard of the provisions of the law.
5. The parties agreed to dispose off the Appeal by way of written submissions.

Submissions:

6. The Appellant's counsel submitted that it is true that the Respondent purchased the suit premises in 1998 after which he took vacant possession of what was sold to him by fencing it. Consequently, it was submitted, the right of action accrued to the Respondent in 1998. This, according to counsel, implies that the primary suit herein which was filed on 29th November 2011, was time barred as at 29th November 2011 pursuant to the provisions of Section 7 of the Limitation of Actions Act.

7. According to the Appellant's counsel, the Magistrate erred by holding that Section 7 of the Limitation of Actions Act did not apply to the suit.
8. The Appellant's counsel submitted that the Respondent failed to produce an agreement for the sale of the suit property; that the Respondent admitted that there was no sale agreement in respect to the suit property and that the suit in the lower court was therefore a nullity in law because it was filed in contravention of the mandatory provisions of Section 3(3) of the Law of Contract Act.
9. Counsel submitted further that the Respondent failed to produce the consent of the Land Control Board for the transfer of the suit property to himself and that it was an error in law and in fact for the trial Magistrate to enter Judgment in favour of the Respondent.
10. The Appellant's counsel finally submitted that the Judgment delivered by the Magistrate contravened the provisions of Order 21 of the Civil Procedure Rules: that a Judgment of the court should be the final determination of a suit and that the Magistrate re-opened the case after delivery of the Judgment.
11. Counsel submitted that after the delivery of Judgment on 16th May, 2013, additional evidence which was not even in existence at the time the Judgment was delivered was tendered; that if the evidence of the surveyor was needed, then that should have been tendered before Judgment was delivered and that having delivered his Judgment on 16th May 2013, the learned Magistrate became *functus officio* in as far as calling for and admitting fresh evidence was concerned.
12. The Respondent's counsel submitted that the Appellant did not plead or give evidence to show that the Respondent's title was in any way obtained fraudulently.
13. The Respondent's counsel submitted that the Appellant admitted in his Defence that he sold the suit property to the Respondent and that the issue of adverse possession cannot operate in this case.
14. Counsel submitted that the sale of the suit property was not challenged, the Appellant having admitted selling the suit property; that the issue of whether the consent of the Board was ever obtained was never pleaded in the Defence and that the issue was just raised in the Appellant's advocate's submissions.

Analysis and findings:

15. The issues that I am supposed to determine in this appeal is whether, in the absence of a written agreement, the suit in the lower court was a nullity; whether the suit in the lower court was time barred and whether the Judgment that was delivered by the learned Magistrate was in breach of the provisions of Order 21 of the Civil Procedure Rules.
16. In the Complaint dated 29th November 2011 and filed on the same day in Kilifi SRMCC No. 352 of 2011, the Respondent herein averred that he purchased land known as KILIFI/MTWAPA/1688 measuring 0.10 Ha from the Appellant.
17. The Respondent further averred in the Complaint that the suit property was excised from land known as Kilifi/Mtwapa/1083.
18. According to the Complaint, when the Respondent sought to occupy his land, he found that the Appellant had built three temporary houses on it.
19. It was the averment of the Plaintiff/Respondent that the Appellant initially showed him a plot belonging to one Solomon Kiruge Kamau which was plot number Kilifi/Mtwapa 1083.
20. In his statement of Defence, the Appellant herein averred that the Respondent purchased the suit property in 1998 and as such the Plaintiff's suit was time barred; that after the Respondent purchased the suit property from him, he showed him the same and the Respondent took possession of the land by fencing it and that for all intents and purposes, the purchase of the suit property by the Respondent contravened the provisions of Section 3(3) of the Law of Contract Act.
21. The Respondent, PW1, informed the trial Magistrate that land known as Kilifi/Mtwapa 1083 was sub-divided into two portions, that is number 1687 and 1688. It was the evidence of PW1 that he purchased land known as Kilifi/Mtwapa 1688 from the Appellant which was duly registered in his name. The Respondent produced the title deed that was issued to him and the official search.
22. It was the evidence of the Respondent in the lower court that the Appellant showed him the wrong plot after the sub-division. However, when the Respondent brought the surveyor on the land in the year 2010, the surveyor informed the Respondent that he had been shown the wrong plot,

- which was plot number 1003 registered in the name of Solomon Kiruga. The search for plot number 1003 was produced as PEXB6.
23. In his evidence, the Appellant, DW1, informed the court that he sold to the Respondent the suit property in 1998 whereafter he showed it to him. It was the evidence of DW1 that after showing the Respondent what he believed to be the suit property, the Respondent fenced it and planted tree seedlings around it.
 24. In cross examination, DW1 (the Appellant) informed the court that he entered into a written agreement with the Respondent and that the copy of the agreement he had was washed away by the el-nino rains. The Appellant admitted that he obtained the Consent of the Board to sub-divided the land and transfer it to the Respondent.
 25. After hearing the two parties, the learned Magistrate delivered his Judgment on 16th May 2013 in which he found in favour of the Plaintiff/Respondent.
 26. The Plaintiff's/Respondent's case in the lower court was straight forward. He purchased land known as Kilifi/Mtwapa/1688 from the Defendant, a fact admitted by the Defendant. However, the Defendant's position is that he sold to the Plaintiff the suit property in 1998 and 2001.
 27. After the said purchase, he was shown a wrong plot altogether, a fact he came to know about in the year 2010 when he took the surveyor on the ground.
 28. All along, the Defendant/Appellant continued to live on the land that he had actually sold to the Plaintiff/Respondent.
 29. The Appellant's/Defendant's claim is that the suit property is not recoverable because twelve years had lapsed from the date that he sold the suit property to the Respondent/Plaintiff.
 30. While dismissing this argument, the learned Magistrate held as follows:

“the Defendant having sold the Plaintiff what he believes is now occupied by the Plaintiff cannot be said to be in adverse possession of his own land which he has allegedly never moved from. The Plaintiff cannot be said to be statute barred in bringing this action because he for some unknown time occupied a parcel of land he genuinely believed was his. He cannot therefore be said to have been dispossessed or discontinued possession of the suit property.....”

31. Section 7 of the Limitation of Actions Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

32. For one to establish when a cause of action accrues, one needs to read Section 7 together with Section 9(1) and 13(1) of the Limitation of Actions Act. Section 13 (1) of the Act provides as follows:

“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.....”

33. The reading of Section 7, 9 and 13 of the Limitation of Actions Act shows that one can only raise a defence of limitation of action if he has dispossessed the owner of land for a period of more than twelve years or if the owner of the land has discontinued possession of his land for over 12 years, and within which period the person raising the defence of limitation has been in possession of the land.
34. If the Plaintiff/Respondent was shown the wrong parcel of land in the year 1998, it cannot be said that he was dispossessed of his land or he discontinued possession of the land that he never knew was his in the first place.
35. Time for the purpose of Section 7, can only start running on the date that the Plaintiff/Respondent realised that what he was claiming was his land was actually not his, which in this case was in the year 2010.
36. In the circumstances, I agree with the learned Magistrate's holding that the defence of limitation was not available to the Defendant because the Plaintiff/Respondent never took possession of the

- suit property in the first place.
37. The second issue that has been raised by the Appellant is that in the absence of the sale agreement, the learned Magistrate should have dismissed the suit pursuant to the provisions of Section 3(3) of the Laws of Contract Act.
 38. Section 3(3) of the law of Contract Act provides that a suit shall not be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and is signed by all the parties. The signatures of each party signing is supposed to be attested by a witness.
 39. The suit before the learned Magistrate was premised on the ground that the Plaintiff was in possession of a title deed. All the Plaintiff was seeking for was for the eviction of the Defendant.
 40. The suit was therefore not predicated on a contract for the disposition of an interest in land. It was based on a title document.
 41. Consequently, it did not matter that the Plaintiff never produced the sale agreement in court.
 42. The agreement would only have been crucial in the proceedings if the Defendant's claim was that the Plaintiff acquired the title deed fraudulently or that he never sold to him the suit property.
 43. Having admitted that he sold the suit property to the Defendant, and title deed having been issued, the Defendant/Appellant cannot claim that he should not be evicted from the suit property because there is no agreement of sale or the Consent of the Board was never obtained.
 44. According to the provisions of Section 143(1) of the repealed Registered Land Act, the court can only order the rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake. That was not the Defendant's case.
 45. Consequently, the trial court could not have inquired into whether the agreement of sale between the Plaintiff and the Defendant, if at all, complied with the provisions of Section 3(3) of the Law of Contract and whether the Land Control Board gave its consent to transfer the suit property considering that the Defendant was not challenging the Plaintiff's title.
 46. The last issue that I am supposed to consider is whether the Judgment by the learned Magistrate contravened the provisions of Order 21 of the Civil Procedure Rules.
 47. After finding that the Plaintiff had proved his case on a balance of probabilities, the learned Magistrate directed as follows:

(a) The District Land Surveyor Kilifi to prepare and file in court within the next fourteen days a Surveyor's ground report with respect to land reference numbers Kilifi/Mtwapa 1688.

(b) The costs of the surveyor to be born by the Defendant.

(c) That the OCS Kilifi Police Station to provide security in the event the surveyor encounters resistance.

(d) This case be mentioned on 30th May for further orders.

48. The District Surveyor, pursuant to the directions of the Court prepared a report dated 12th June, 2013 in which he stated that the suit property had six temporary structures and one well.
49. In his "final orders" of 22nd August 2013, the learned Magistrate ordered the Defendant to give vacant possession of the suit property within 45 days.
50. The orders that were given as "Final Orders" are the same orders that the Plaintiff had prayed for in his Plaintiff.
51. It is not clear why the learned Magistrate ordered for the preparation of a ground report after delivery of his Judgment in which he had found that the Plaintiff had proved his case on a balance of probabilities.
52. Having found in favour of the Plaintiff, and in view of the fact that the Defendant had not denied that he was residing on the suit property, the Court ought not to have invited fresh evidence on record.
53. However, considering that the report that was subsequently filed by the surveyor did not alter the evidence that had already been tendered, or change the findings of the Judgment, the irregularity

by the learned Magistrate of making “final orders” after the Judgment is not fundamental as to render the said Judgment invalid. The court had already found, and correctly so, that the Plaintiff had proved his case on a balance of probabilities. The so called “final orders” were just a reinstatement of the Judgment, whose analysis and findings I agree with. The fact that the Magistrate wanted to know if indeed the Defendant was in occupation of the suit property was not prejudicial to the Defendant/Appellant.

54. For the reasons I have given above, I find and hold that the Appellant's Appeal is unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this **13th** day of **March**, 2015.

O. A. Angote

Judge