



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL APPEAL NO. 19 OF 2008

(Being an Appeal from the decision of the Senior Resident Magistrate's court in Kilifi, SRM's Court Civil Case Number 549 of 2007 delivered on 6th May, 2008 by Hon. J. Nduna SRM)

MASUMBUKO JAMBO MWASAMBU.....APPELLANT

=VERSUS=

HARRISON DZENGO KENGA.....RESPONDENT

JUDGMENT

Introduction

1. On 6th May, 2008, Hon. James Nduna, SRM, struck out the Appellant's suit in Kilifi SRMCC No. 549 of 2007 on the ground that the suit was time barred. In a short Ruling, the learned Magistrate, after reciting paragraph 5 of the Plaintiff and Paragraph 7 of the Defence, stated as follows:

“I agree with the Defendant's counsel that more than 12 years have elapsed since the cause of action arose.”

2. It is that Ruling that is the subject of this appeal. According to the Appellant, the learned Magistrate erred in law and in fact by not letting the suit to proceed for full trial before giving a considered judgment on whether the Appellant's suit was time barred or not; that the Magistrate did not consider properly the cause of action and the Appellants' claim against the Respondent and that the learned Magistrate did not give any proper reasons for the striking out of the Appellant's suit.

Submissions:

3. The Appellant's advocate submitted that there was need for evidence to be tendered as to when the Respondent took possession of either the entire suit property or 6 acres or 3 acres of plot number Kilifi/Ngeranyi/868.
4. According to counsel, the Respondent did not state in his Defence when he first occupied the suit property; that the Magistrate did not state how he arrived at the conclusion that 12 years had lapsed since the cause of action arose and that the Magistrate arrived at a finding that was not properly considered.
5. According to the Respondent's advocate, the Plaintiff's claim is pleaded in paragraphs, 3,4,8,10 and 11 of the Plaintiff and in Paragraph 4 of the Reply to Defence and Defence to counter-claim.
6. Counsel submitted that the lower court found from the pleadings that the cause of action arose in the year 1993; that the suit was filed on 25th September, 2007 after 12 years period of limitation

had lapsed and that since this facts were clear from the pleadings, there was no need for the case to proceed to full hearing.

Analysis and findings:

7. The Plaintiff (Appellant) has averred in his Plaintiff that at all material times, he was the legal and registered proprietor of plot number Kilifi/Ngerenyi/868 measuring 12 acres. Sometimes in 1993, the Plaintiff and the Defendant entered into an agreement in which agreement the Plaintiff agreed to sell to the Defendant 3 acres of the suit property.
8. The Plaintiff has further averred that the transfer of 3 acres of the suit land was subject to the Plaintiff applying for and obtaining consents from the relevant Land Control Board for the sub-division of the land.
9. At paragraph 8 of the Plaintiff, the Plaintiff pleaded that the Defendant, in total disregard of the Agreement, and despite the fact that he had not obtained the consent of the Land Control Board, is demanding title and possession of half of the Plaintiff's suit land which is 6 acres.
10. According to paragraph 10 of the Plaintiff, the Plaintiffs' claim against the defendant is that the Defendant has unlawfully, illegally and without any colour of right claimed possession and title of the Plaintiffs' parcel of land measuring 6 acres contrary to the agreement.
11. On the other hand, the Defendant pleaded that his claim is for 6 acres of the suit land is lawful and in accordance with the sale agreement; that the Plaintiff and the Defendant do occupy plot number Kilifi/Ngerenya/868 and that on 14th February 1989, the Plaintiff made a sale agreement with the Defendant for the sale of 6 acres of the suit land.
12. According to paragraph 8 of the Defence, the Plaintiff granted to the Defendant vacant possession of the 6 acres of the suit land and subsequently on 23rd October 1993 the parties agreed to increase the purchase price to kshs. 70,000/= and the Defendant went into possession of the 6 acres of the suit land and built a house thereon.
13. The Defendant has averred in his Defence that on 17th January, 1996, the Plaintiff executed a transfer of 6 acres of the suit land in favour of the Defendant and on 24th July 2000, a title deed for 6 acres of the suit land was issued to the Defendant. However, it was later discovered that all along, the parties were dealing with Kilifi/Ngerenya/898 instead of 869. When asked to return the titles for the sub-division, the Plaintiff declined. The Defendant also filed a counter-claim for the following order to issue:
 - a. **A declaration that the Plaintiff sold to the Defendant 6 acres out of plot No. Kilifi/Ngerenya/868 and that the documentation of the land being sold in the sale agreement dated 14th February, 1989 and 23rd October 1993 and in the transfer made in 17th January, 1996 as plot number Kilifi/Ngerenya/898 was erroneous or made by mistake.**
14. In his reply to Defence the Plaintiff stated that he only sold to the defendant 3 acres and not 6 acres. However, the Plaintiff admitted at paragraph 4 that the Defendant is occupying only six acres of the said plot which occupation is illegal and unlawful because the Defendant was entitled to occupy three acres of the plot had the Land Control Board given its consent for the sub-division and sale of the 3 acres.
15. The learned Magistrate, after quoting a few paragraphs in the Plaintiff and Defence upheld the Defendant's Preliminary Objection that more than 12 years had lapsed since the cause of action arose.
16. The learned Magistrate neither gave the reasons for that holding nor analysed the submissions that were made by the respective counsels.
17. The admitted facts by the Plaintiff in his Plaintiff are:
 - a. In the year 1993, he entered into an agreement to sell to the Defendant 3 acres of plot no. Kilifi/Ngerenyi/868.
 - b. The transfer of the 3 acres was subject to the Plaintiff obtaining the consent of the Land Control Board and
 - c. That the Defendant is now demanding title and possession of half of the Plaintiff's suit land.
18. The Plaintiff has not admitted in his Plaintiff that the Defendant lawfully took possession of the 3 or

- 6 acres. The issue of the possession of the 3 acres, 6 acres or at all by the Defendant in 1993 does not arise from the Plaint. Indeed, at paragraph 8 of the Plaint, the Plaintiff has stated that the Defendant is demanding title and possession of half of his land.
19. The Defendant has not stated in his Defence when he took possession of the 6 acres he allegedly bought from the Plaintiff other than stating that he paid to the Plaintiff the extra sum of kshs. 30,000/= and went into possession of the 6 acres of the suit land and built a house thereon.
20. The issue of when the Defendant took possession of 3 acres or 6 acres, if at all, can only be ascertained upon perusal of the sale agreements and after receiving *viva voce* evidence.
21. Section 7 of the Limitation of Action states 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 accrued to some person through whom he claims, to that person.”

22. The Plaintiff's cause of action as against the Defendant could only have accrued upon the taking of possession of the disputed land by the Defendant. As I have already stated above, it is not clear from the pleadings when the Defendant took possession of a portion of the Plaintiff's land. That issue can only be dealt with at the hearing of the suit and not as a preliminary point of law.
23. For the reasons I have given above, I allow the Appellant's Appeal as prayed.

Dated and delivered in Malindi this 20th day of June, 2014.

O. A. Angote

Judge