



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 160 OF 2006

PETER MUSYOKI KATHAMA APPELLANT

VERSUS

HANNINGTON KALEVE KATHAMA RESPONDENT

*(Being an appeal from the Judgment of the Resident Magistrate's Court at Kitui of Hon O. Kizito
(R.M) Civil Case No. 223 of 1997 dated 14th September 2006)*

(Before B. Thurania Jaden J)

RULING

1. The Appellant, **Peter Musyoki Kathama** (the Plaintiff before the lower court) had sued the Respondent **Harrington Kaleve Kathama** (Defendant) vide a plaint filed in court on 13/8/1997 for General Damages for loss of user and *mesne* profits. The Appellant also sought a permanent injunction to restrain the Respondent from entering into land parcel **Title No. Mutonguni/Kauwi/758** (suitland) or any part thereof or committing any acts of user, damage or wastage thereon. The Appellant based his claim on what he termed as a rescinded agreement between him and the Respondent for the sale of the suit land.
2. The claim was denied by the Respondent. The Respondent accused the Appellant of having failed to avail himself before the **Land Control Board** to obtain the necessary consent.
3. The facts of the case are generally not in dispute. It is not in dispute that the Appellant was the registered owner of the suitland. It is also not in dispute that the Appellant and the Respondent entered into a sale agreement and the Appellant sold 1½ acres portion of the suit property to the Respondent.
4. The Appellant (PW1) gave evidence that his children were unhappy with the sale and he returned the purchase price to the Respondent who refused to accept the same. That the Respondent remained in occupation of the portion of land sold to him and uses it to graze his animals therein although he never built any home there. During cross-examination the Appellant clarified that if it was not for the intervention by his children, he would have transferred the portion of land in question to the Respondent. The Appellant gave the year that his children stopped him from selling the land as 1995.
5. The Respondent (DW1) in his evidence described the Appellant as his brother and the one who sold the portion of land in question to him. The Respondent testified that he took vacant possession of the plot and he grazes his livestock therein. The Respondent's interest is the land and not the refund of the purchase price.
6. The trial magistrate arrived at the finding that the sale transaction was not subject to the obtaining of the Land Control Board Consent. The trial magistrate further arrived at the conclusion that the

Respondent's occupation of the portion of land amounts to specific performance in furtherance of the sale agreement. The Appellant's suit was then dismissed with costs.

7. The Appellant was aggrieved by the decision of the trial court and appealed to this court on the following grounds:-

1. **"The learned trial magistrate erred in law by holding that the sale agreement between the Appellant and the Respondent was not subject to the Appellant obtaining the consent of the Land Control Board which holding was contrary to the mandatory provisions of section 6 (1) of the Land Control Act, Cap 302 of the Laws of Kenya.**
2. **The learned trial magistrate erred in law when he held that the Respondent had rights over the portion of the Appellants land even when the rights were extinguished by operation of the law.**
3. **The learned trial magistrate erred in law when he failed to find that the Respondent was a trespasser on the Appellant's land, and that the Appellant was entitled to an injunction against the Respondent.**
4. **The learned trial magistrate erred in law when he failed to follow established principles of law, an error that made him dismiss the Appellant's suit with costs when he ought to have entered judgment in favour of the Appellant with costs against the Respondent."**

8. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. See for example **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

9. The appeal was canvassed by way of written submissions which this court has duly considered.

10. The facts of this case are not in dispute. The issue to deal with is therefore the law applicable to the said facts.

11. The first legal hurdle in this suit was whether this suit fell within the jurisdiction of the lower court or the **Land Disputes Tribunal**. That question was settled by **J.W. Mwera, Judge** (as he then was) in his ruling dated 5/2/2000 wherein the lower court's ruling that it had the requisite jurisdiction to hear the matter was upheld.

12. The Appellant in his evidence raised the issue that the Land Control Board's Consent was not obtained. That issue was also raised before this court by the learned counsel for the Appellant. **Section 6 (1) of the Land Control Act (repealed) stipulates as follows:-**

"Each of the following transactions-

- a. **the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**
- b. **the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning Regulations, 1961 for the time being apply;**
- c. **the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,**

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

13. The contract between the Appellant and the Respondent was therefore void and could not give the Respondent any rights over the portion of land that he claims as the consent of the Land Control Board was not obtained.

14. The sale agreement was not reduced in writing. This contravened section 3 of the **Law of**

Contract Act Cap 302 Laws of Kenya which provides that a contract for the sale of land must be in writing.

15. Was the Respondent a trespasser in the said land? The undisputed fact is that the sale took place in the year 1982 when the Respondent took vacant possession of the same. The plaint herein was filed on 13/8/1997. That is 15 years from the date of the transaction. According to the Appellant's own evidence, his children stopped him from selling the land in the year 1995. That is 12 years from the date of the sale transaction. The Appellant came to court late in the day.

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.”

By the time the Appellant came to court, his claim had been extinguished by dint of operation of the law.

16. It was submitted by the counsel for the Respondent that at the time of the sale in the year 1982 the suitland was not governed by the **Land Control Act Cap 302 Laws of Kenya**. However, the **Land Control Act's** date of commencement is the 12th December 1967. **Section 6** of the said Act which deals with control of dealings in Agricultural Land came into operation in 1980.

17. **Section 6 (3)** of the said Act provides as follows:-

- a. **“A transmission of land by virtue of the will or intestacy of a deceased person, unless the transmission would result in the division of the land into two or more parcels to be held under a separate title; or**
- b. **A transaction to which the Government or the Settlement Fund Trustees or a County Council is a party”.**

The transaction was therefore subject to the provisions of section 6 of the **Land Control Act Cap 302 Laws of Kenya**. The decision of the **Court of Appeal in Jacinta Wanjiku Kamau –vs Isaac Kamau Mungai & Another – Court of Appeal Civil Appeal No. 59 of 2001 (Nrb.)** is distinguishable. In the said decision, the consent of the Land Control Board had been obtained. It is also noted that the Claimant therein was a wife whose claim was based on trust.

18. The evidence that the Respondent was in occupation of the suit premises at the time this suit was instituted is not in dispute. The prayer for a permanent injunction to restrain the Respondent from entering into the portion of land in question was therefore misplaced. The court cannot restrain the Respondent from entering land that he had already entered.

19. Both parties in this suit have been caught up by the law. The Appellant's claim was time barred and the appeal cannot succeed. For the Respondent, the sale transaction was not backed up by the consent of the **Land Control Board** for specific performance to come into play. The parties therefore remain in the same position that they were in prior to the filing of the suit. Consequently, although for different reasons, I agree with the judgment of the lower court.

20. The original Appellant and Respondent were brothers. The Defendant however passed away during the pendency of the appeal and was substituted by his wife, **Kamene Kaleve** on 22/10/2008. These being close family members who were caught up by the provisions of the law, I will order that each party do meet its own costs of the appeal.

21. With the foregoing, I dismiss the appeal with no orders to costs.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **29th** day of **September** 2014.

.....

B. THURANIRA JADEN

JUDGE