Mutubi v Mbiti (Environment and Land Appeal 7 of 2020)
[2022] KEELC 15727 (KLR) (29 June 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL 7 OF 2020

A KANIARU, J

JUNE 29, 2022

BETWEEN

NICHOLUS MURIUKI MUTUBI ..... APPELLANT

AND

MWANIKI MBITI ..... RESPONDENT

(Being an appeal against the Judgement of Hon. A.N. Makau Ag. SRM dated 19.03.2015 in Siakago SPMCC NO. 8 OF 2013)

JUDGMENT

1. This appeal contests the outcome of the lower court's judgement of Hon AN Makau Ag SRM delivered on March 19, 2015 in Siakago SPMCC No 8 of 2013. The appellant – Nicholus Muriuki Mutubi– was the plaintiff in the suit while the respondent Mwaniki Mbiti– was the defendant.

2. In the lower court, the appellant filed a suit against the respondent vide a plaint dated February 28, 2013. The plaint was later amended pursuant to the orders of August 1, 2013. The appellant's averments in the amended plaint, were that on or about August 22, 2003, he entered into an agreement for sale of land with the respondent and the subject of the contract was land parcel No Embu/ Kithunthiri/ 2189, which had been hived off from land parcel No Embu/ Kithunthiri/ 321. The consideration for the said contract was Kshs 130,000/. According to the appellant, the respondent had received and acknowledged the amount, save for Kshs 20,000/- which was to cater for some traditional items and which was payable upon transfer of the land to him.

3. The respondent was said to have failed to execute the transfer in spite of the appellant's willingness and readiness to pay the him the balance. He is also said to have subsequently sub-divided Land parcel No Embu/ Kithunthiri/ 2189 into two portions viz: land parcel No Embu/ Kithunthiri/ 2589 and Land parcel No Embu/ Kithunthiri/ 2590. He is accused of deliberately refusing to transfer the resultant land parcels which comprise the ¼ acre which the appellant was purchasing. The appellant

had therefore sought for orders for specific performance for transfer of land parcels Number Embu/ Kithunthiri/ 2589 and Embu/ Kithunthiri/ 2590, costs of the suit, and interest on costs. He further prayed for any other relief that the court may deem fit to grant in the circumstances.

4. The respondent filed his amended statement of defence and he denied having received Kshs 130,000/- but admitted having received Kshs 110,000/- as part of the purchase price, leaving a balance of Kshs 20,000/-. He pleaded that he was ready to refund the Kshs 110,000/- to the appellant. He pleaded that he had demanded payment of the whole of the purchase price but the appellant had refused to pay. It was his case that there was failure to complete the said payment on time and further that no Land Control Board's consent was applied for and obtained. The respondent denied having failed on his part to fulfill his part of the agreement but pleaded that the contract had lapsed. He denied being liable to transfer the suit land parcels and stated that the appellant was entitled to refund of the money paid as the purchase price.

5. The matter proceeded for hearing and each party gave his evidence before the trial court. The appellant's evidence was that on August 22, 2003 he entered into an agreement with the respondent for the sale of a plot measuring 100 x 100 at Kshs. 130,000/-. He paid Kshs. 70,000/- on the date of the agreement, Kshs 20,000/- on 10.10.2005 and later Kshs 20,000/- on May 25, 2006. He further said that he later discovered that the suit land had been sub-divided into new land parcels (LR 2589 and 2590) and all this happened as he was waiting for the title deed to be processed as that was what they had agreed. That he subsequently received a letter dated November 7, 2012 from the respondent's advocate intimating that the respondent was willing to refund the money. The appellant proceeded to close his case.

6. The respondent testified in opposition to the case. His evidence was that the appellant paid him Kshs 70,000/- and later paid Kshs 20,000/- twice but that when he went to claim the balance, the appellant instead took away the stones and the sand which he had placed on the suit land and allegedly said that he was never interested in the land as there were power lines which were passing over it. The respondent also said he had deposited the money he had received from the appellant in court and was given a receipt. In cross examination, his testimony was basically that he used to remind the appellant to pay the balance but he did not pay. He testified that he could not apply for the Land Control Board's consent before the whole purchase price was paid.

7. The trial court rendered its judgment on March 19, 2015. It found and held that the appellant had failed to prove his case on a balance of probabilities. It further found that it had not been shown that the respondent was in breach of the contract. It also found that since the appellant had not paid the whole of the purchase price, he was not entitled to an order of specific performance. Further that the suit before it was time barred by virtue of section 4 of the *Limitation of Actions Act* as the matter was filed about ten (10) years after the contract in issue had been entered into. The court further found that the appellant herein was entitled to the refund of the purchase price already paid and ordered that the same be refunded.

8. It is this judgment by the trial court which is the subject of the instant appeal. It was instituted by way of a memorandum of appeal dated September 13, 2016. The appellant raised six (6) grounds of appeal, which are as follows:

    1. That the learned trial magistrate erred in law in arriving at the decision that the appellant had no cause of action against the defendant and that the suit was time barred

    2. That the learned trial magistrate erred in law and fact when she erroneously applied the provisions of the *Land Control Act* cap 302 Laws of Kenya whose application was to apply when the defendant demarcates the particular portion to sell to the appellant.

3. That the learned trial magistrate erred in law and fact when she held that the contract was breached by the appellant when it was not the case or supported by evidence tendered.

4. That the trial magistrate erred in law when she gave contradictory findings hence unjustifiable judgment.

5. That the learned trial magistrate's judgment was against the weight of the evidence tendered and the applicable law.

6. That the learned trial magistrate erred in law when she refused/ failed to give the appellant the mandatory period of the right to appeal.

9. The appellant as thus prayed that the appeal be allowed and the judgment of March 19, 2015 together with the subsequent orders thereto be set aside with costs to himself.

Submissions

10. The appeal was canvassed by way of written submissions. The appellant filed his submissions on May 5, 2022. He submitted that the trial court erred in finding that the suit was time barred under section 4 of the *Limitation of Actions Act*. His case was basically that the time for the purpose of the said provision started to run on November 7, 2012 when a letter was written by the respondent's advocate to the appellant rescinding the contract and not the time when the parties signed the agreement as both parties were desirous of proceeding with the contract up to the said date which is when the same became untenable. Further that the appellant's right to recover the money is governed by section 19(1) of the *Limitation of Actions Act* which provides that the same cannot be recovered after the end of twelve (12) years. It was averred that the appellant was within the time limited to institute the suit for recovery of the purchase price, which was actually his alternative prayer.

11. In support of the second ground of appeal, it was submitted that the balance was to be paid upon sub-division of the land and transfer of the same to the appellant, and that the respondent did not make any request for any money to facilitate the obtainment of consent for the portion of land the appellant was purchasing. Further that the trial court erred in not ordering refund of the purchase price plus interest which was in contravention of section 22 of the *Land Control Act* cap 302. The appellant further submitted that the trial court erred in its finding and that it was the respondent who breached the contract by voiding it expressly on November 7, 2012. Further also that the finding was contradictory and unjustifiable and unsupported by evidence tendered. It was further said that the trial court erred in awarding the defendant costs whereas it was the respondent who had voided the contract. The appellant thus prayed that the appeal be allowed with costs.

12. The respondent filed his submissions on April 25, 2022. He submitted that the appeal herein was filed out of time as the judgment by the trial court was delivered on March 19, 2015 and the certificate of delay had been issued on September 8, 2016. The appeal was filed on March 15, 2018 which was a period of three years after the delivery of the judgment and two years after the certificate of delay was issued. Reliance was placed on section 79G of the *Civil Procedure Act* and the respondent prayed that the appeal be struck out with costs.

13. Further it was submitted that the appellant did not attach a copy of the decree to the record of appeal and this failure was fatal to the appeal. Reliance was placed on section 65 of the *Civil Procedure Act* and order 42 rule 13(4) (f) of the *Civil Procedure Rules* 2010 and the cases of *Ndegwa Kamau T/A Sideview Garage v Fredlick Isika Kalumbo* (2016) eKLR and *Rachael Wambui Nganga & another v Rahab Wairimu Kamau* (2020) eKLR. Relying on the cases of *Paul Karenyi Leshuel v Ephantus Kariithi Mwangi & another* (2015) eKLR and *Kilonzo David T/A Silver Bullets Bus Company v Kyalo Kiliku*

& another (2018) eKLR, it was submitted that omission to attach a copy of the decree appealed from goes to the substance of the appeal and cannot be wished away as a procedural technicality or cured under article 159 of the *Constitution* of Kenya 2010.

14. On ground one of the appeal, it was submitted that the trial court rightfully found that the suit was time barred and properly applied section 4(4) of the *Limitation of Actions Act* as a period of more than ten years had lapsed from the time the agreement was entered into and the time the suit was filed. Reliance was placed on the cases of *Michael Benhardt Otieno v National Cereals and Produce Board* (2017) eKLR and *Bosire Ogero v Royal Media Services* (2015) eKLR.

15. On the second ground of appeal, it was submitted that the trial court correctly applied the law and that since the land subject of the agreement was agricultural land, Land Control Board's Consent was a mandatory requirement as provided for under section 6 of the *Land Control Act*. The same was to be applied for and obtained within six (6) moths of the agreement as provided for under section 8 of the said *Act* and failure to do so made the agreement void. Reliance was placed on the case of *Gatere Njamunyu v Joseck Njue* Nairobi Civil Appeal No 20 of 1992. On ground 3 of appeal, it was submitted that the trial court was right in finding that the appellant did not perform his part of the contract as he did not pay the whole of the purchase price to enable the procuration of the Land Control Board's consent and also transfer of the suit land.

16. On ground 4 of appeal, the respondent submitted that the trial court was correct in analysing the evidence before it and came up with a sound judgment. The appellant had allegedly not pointed out where the trial court's judgment was contradictory. In response to ground 5 of appeal, it was submitted that the trial court considered the evidence before it, to wit, the land control board's consent had not been obtained; that the suit was time barred; that the appellant had breached the contract; and that the judgement was entered on the weight of the evidence tendered. On ground 6, it was submitted that the appellant was given time to appeal but deliberately decided not to appeal. The respondent as thus submitted that the appeal herein lacks merits and the same ought to be dismissed with costs to the respondent.

Analysis And Determination

17. I have considered the appeal as filed, the lower court record, and the rival submissions by the parties. This being a first appeal, the court reminds itself of it's duty as a first appellate court which is to re-evaluate, reassess, reanalyse matters of both law and fact and consider the evidence afresh and come up with it's own conclusion. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Gitobu Imanyara & 2 others v Attorney General* {2016} eKLR).

18. The court further has powers as bestowed upon it under the provisions of section 78 of the *Civil Procedure Act* which stipulates as follows:

> "Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
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> (a) to determine a case finally;
>
> (b) to remand a case;
>
> (c) to frame issues and refer them for trial;
>
> (d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial"

19. I have re-evaluated, re-assessed, and re-analysed the pleadings and evidence before the trial court. I have given the same the fresh and exhaustive scrutiny necessary. It is my considered view that the main issue for determination is whether the appeal is merited in light of the grounds it is anchored on. However, I note that the respondent herein raised two issues in his submissions which in my view go to the jurisdiction of this court to determine the instant appeal. The respondent submitted that the appeal was filed out of time and as such the same ought to be struck out. He further submitted that the instant appeal is defective and/or fatal for failure to attach a copy of the decree appealed from in the record of appeal. I find these issues worth consideration as the decision on the same will determine the direction this appeal will take.

20. In the instant case, the judgment by the trial court was delivered on March 19, 2015. The appellant then requested for typed proceedings on August 24, 2015 and was issued with a certificate of delay on September 8, 2016. It is then that he filed a memorandum of appeal on September 13, 2016 and the record of appeal on March 9, 2018. The respondent in his submissions has argued that the appellant filed the appeal out of time. According to him, the appeal was filed on March 15, 2018 which he avers was three years after judgment was delivered by the court.

21. The time period within which one ought to bring an appeal before the court is stipulated under section 79G of the *Civil Procedure Act* and as was rightfully cited by the respondent. The same provides as follows:

> "79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. (emphasis court's)"

22. Accordingly, the law is clear that an appeal ought to be filed within 30 days from the date of judgment. As already stated, judgment in this matter was delivered on March 19, 2015. The 30 day period therefore lapsed on April 19, 2015. As at that time, no appeal had been filed. But it is clear that time ceases to run when one requests for decree or order as stipulated under section 79G of the *Civil Procedure Act*. The appellant herein requested for typed proceedings which in essence included decree or order, on August 24, 2015 which was roughly four months after the 30-day period had lapsed. As at the time the typed proceedings were being sought the time period within which the appeal ought have been filed had already lapsed.

23. In the circumstances, the alternative that the appellant had was to file an application for the appeal to be admitted out of time whilst giving good and sufficient cause for the delay. I have perused the court record and I have not come across an application that was filed by the appellant seeking extension of time within which to bring the appeal. It is not surprising that the appellant has remained mute on this issue despite it having been raised by the respondent. He was possibly aware that he indeed did not file his appeal within the time stipulated.

24. However, the issue of filing an appeal out of time without leave of court is a serious one and even in instances when parties fail to address it, the court can raise the issue suo moto. My understanding of section 79G of the *Civil Procedure Act* is that the time period set out under that provision is mandatory and the appellant cannot just approach the court out of time and hope that the court will turn a

blind eye to the issue. The filing of the appeal outside of time goes to the validity of the appeal. It is a jurisdictional issue and once the appeal is filed out of time without leave of court, the court subsequently lacks jurisdiction to entertain it.

25. The court of appeal in the case of *Patrick Kiruja Kithinji v Victor Mugira Marete* [2015] eKLR, while discussing the effect of an appeal filed out of time, stated as follows:

> " In our view whether or not an appeal is filed on time goes to the jurisdiction of this court. It is trite that this court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the court. To hold otherwise would upset the established clear principles of institution of an appeal in this court".

26. The appeal herein, having therefore being filed out of time, is one that cannot stand as this court lacks jurisdiction to entertain it.

27. I will nonetheless proceed to determine whether failure to attach a decree to the record of appeal is fatal. The respondent is of the view that it is. The documents that ought to form a record of appeal are well outlined under the provisions of order 42 rule 13(4)(f) of the *Civil Procedure Rules*, 2010 which provides as follows-

> " (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 the possession of either party have been served on that party, that is to say:
>
> (a) the memorandum of appeal;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal." (emphasis added).

28. A decree is one of the documents which are outlined as documents that ought to form a record of appeal before the same is admitted for hearing. I have had a look at the record of appeal and I note that indeed the appellant has not attached a decree as required by the law. However, does this failure render this appeal fatal? I think so. I say this for reason that a decree serves the purpose to inform the court of the outcome of the suit and precisely the orders issued by the court.

29. In the rather old case of *Chege v Suleiman* [1988] eKLR the Court Of Appeal stated that failure to attach decree or order to a record of appeal is a jurisdictional one. It rendered itself thus:

> " But we concur positively in the submission of Mr. Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on proper interpretation of Section 66 of the *Civil Procedure Act* which confers a right of appeal from the High Court to this court from "decrees or orders of the High Court". And the holdings were predicated on the fact

that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees orders were formerly extracted as the basis of the appeal.

30. Further, in *Paul Karenyi Leshuel v Ephantus Kariithi Mwangi* [2015] eKLR, the importance of including a decree in the record of appeal was explained thus:

> " The court of Appeal ..... in Civil No 7 of 1998 – Municipal Council of Kitale v Fedha[1983] eKLR held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent ..... one may ask why so much importance is attached to this document: the answer appears to me that an appellate court can only uphold or overturn what has been demonstrated to exist ..... much as this is contained in the rules, it is not in my humble view, a requirement that can merely be dismissed as a procedural technicality that may be swept under the carpet: the question whether or not there is indeed an appeal which calls for the appellate court to exercise it jurisdiction in that respect goes to the root of the appeal itself for without an appeal properly so called, any attempt to invoke or exercise that jurisdiction would be in vain."

31. Finally, in the case of *Bwana Mohamed Bwana v Siluano Buko Bonaya & 2 others* [2015] eKLR, the supreme Court of Kenya expressed itself as follows:

> " Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the Law. A court can not exercise it adjudicatory powers conferred by law, or the *Constitution*, where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.

32. I think it is now sufficiently clear that the appeal before me is fatally defective for, first, being filed out of time, and, second, omitting to include the decree in the record of appeal. It is particularly important to appreciate from the supreme court decision (supra) that failure to include even other vital or relevant documents in a record of appeal may render the entire appeal incompetent.

33. The lower court was faulted for applying the *Land Control Act* cap (302) to the matter. According to the appellant, the Act could only come into play after the land was demarcated. In my view, the appellant is laboring under a serious misapprehension of the law. The application of *Land Control Act* is never pegged on any demarcation of land. The Act comes into play when the transaction between the parties is in what the Act calls "controlled area" which, in the matter at hand, was such area by dint of the land being agricultural land. The crucial factor to consider is therefore where the land is, not whether the land is demarcated. The lower court was therefore right to invoke the provisions of *Land Control Act*.

34. The lower court was further faulted for making a finding that the matter is caught up by *Limitation of Actions Act* (cap 22). According to the appellant, time in this matter started running after November 7, 2012 when the respondent allegedly wrote a letter indicating unwillingness to honour the terms of the contract. This matter was first filed in court in February 2013. If we believe the appellant, his suit was timeously filed as less than one year had passed from the time the letter was written. But the crucial consideration in my view is whether there was a valid contract between the parties at the time the respondent is said to have written the letter. My view is that there wasn't and the letter was not even necessary. The agreement had long ceased to become valid through the operation of the law.

35. According to section 8 of the Land Control Board, a sale of land transaction or agreement is supposed to be followed up with an application to Land Control Board requesting for consent. That has to be

done within six months "of the making of the agreement for the controlled transaction". And that application itself can be made "by any party thereto" (please see section 8 (1) of the *Land Control Act* (cap 302)). Section 6 of that same Act makes the transaction or agreement void if the relevant Land Control board consent is not obtained. The letter written was therefore addressing an agreement that had already become void or invalid.

36. There is a window of opportunity afforded by section 8(1) of the *Land Control Act* for a party to apply to the High Court seeking for extension of time within which consent of Land Control Board can be obtained. Where a party obtains an order extending time from the High Court, the validity of the sale contract can extend beyond six months. But where, as in this case, that is not done, the validity of the contract can not extend beyond six months from the time the agreement is made. It is important to appreciate that the validity does not depend on payment or non-payment of any monies stated in the agreement. The validity is determined by the operation of the Law, which in this case is six months after making of the agreement.

37. It logically follows that six months after August 22, 2003 – which is the date on which the appellants states to have entered into the agreement – the contract of sale of land became void between the parties and was no longer valid. It is therefore wrong for the appellant to say that time started running when the respondent wrote the letter expressing willingness to refund the money paid to purchase the land. In my considered view, the cause of action arose when the time within which to obtain consent of Land Control Board was coming to an end. Given that the agreement was allegedly made on August 22, 2003, that time expired sometimes in February 2004. The suit herein was filed in 2013. That was long after the six year period required to file a suit based on a breach of contract. It therefore becomes obvious to me that *Limitation of Actions Act* applies in this matter and I wouldn't fault the lower court for relying on it.

38. The issue of contradictions was raised. After reading the lower court judgement, I was unable to find any contradictory findings as alleged in the grounds of appeal. The submissions of the appellant do not point to any and the respondents submissions have alluded to this omission. I am also not persuaded that the appellant's evidence was lightly treated or not given its due weight. The lower court clearly addressed itself to the evidence given by both sides before giving its analysis and applying the law to make its decision.

39. The appellant complained that he was not given the right of appeal. If what is appealed against was a ruling on an interlocutory application, I would take this point much more seriously since not all rulings on interlocutory applications can be appealed against. But where the appeal is against a judgement, the right of appeal is for a party to invoke and exercise. The court can not deny it. It has no power to do so. It is for a party to take it. The appellant was represented in the lower court. I would be reluctant to believe that his counsel did not know that he could appeal as of right.

40. In the appellants submissions, he seems to suggest that the lower court had been asked for recovery of money, possibly the amount of purchase price already paid. There was nothing like that in the amended plaint. The appellant simply sought for specific performance in the lower court as the main prayer. There was no prayer at all for recovery of any monies. Section 19(1) of *Limitations of Actions Act* (cap 22), which the appellant seems to think was applicable, was of no use or application in this matter.

41. Finally, I need to say something about the remedy of specific performance sought by the appellant. It is an equitable remedy in the law of contract invoked where and when damages would not be an adequate remedy. The case before the lower court was principally about breach of contract by the respondent. Ordinarily, a party's redress for breach of contract is the common law remedy of damages. The equitable remedy of specific performance is only invoked where damages would not suffice or,

when in the opinion of the court, it would be unconscionable to allow the party in breach to get away with it simply because he can afford to pay damages. A party seeking the remedy of specific performance is therefore duty bound to demonstrate that damages are not an adequate remedy. The appellant never tried to do this. He simply proceeded as if the remedy he was seeking was the primary remedy to ask for in law.

42. The upshot, given what I have so far said in my analysis, is that the appeal herein is one for dismissal. I hereby dismiss it but I make no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 29TH DAY OF JUNE, 2022.

A.K. KANIARU

JUDGE

In the presence of Ngare Njeru for appellant and M/s Mukami for Kareithi AP for Respondent.

Court Assistant: Sylvia W.