



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 140 OF 2009

MWANGI NJOROGE.....APPELLANT

Versus

PATRICK WAIHENYARESPONDENT

(Appeal arising from the judgment of Senior Resident Magistrate's

Court Murang'a delivered on 1st July 2009

JUDGMENT

This is an appeal against the judgment of the Senior Resident Magistrate's court Murang'a delivered on 1st July 2009 wherein the plaintiff/Appellant suit was dismissed with costs.

Being dissatisfied with that judgment the Appellant has filed an appeal against the same and listed three grounds of appeal namely:

- a. The learned trial magistrate erred in law and fact in misinterpreting when the cause of action arose and based year 1983 as the time the cause of action arose other than 1997 when land parcel no. Loc. 20/GITHURI/916 was retransferred back to the respondent and another title deed re-issued in the respondent's name.***
- b. The learned trial magistrate erred in law and fact in finding that the cause of action was based on a contract and thus S.4 of the Limitation of Actions Act applied instead of finding that the cause of action was based on actions to recover land and thus invoke S.7 of the Limitation of Actions Act in calculating when the cause of action arose.***
- c. The learned trial magistrate erred in law and fact in finding that the cause of action was time barred when it had not thus arose at a wrong decisions.***

When this matter came up for direction the parties by consent agreed that the same be determined by way of written submissions which were filed on 1st September 2011 by the Appellant and 14th October 2011 by the Respondent respectively which I have had the advantage of reading and considering. I have also looked and considered the pleadings and proceedings in the lower court.

From the said submissions it is clear that the issue for determination by this court is as to whether the cause of action was based upon contract or an action to recover land as stated by the Appellant and further

as to what date is applicable in calculating when time started to run for the parties herein.

It is not disputed between the parties herein that the subject matter of this appeal is based upon a contract of sale of land. The Appellant by a plaint dated 20th February 2004 in paragraph 3 thereof avers that on or about 30th July 1982 the defendant herein referred to as the Respondent entered into an agreement for sale of land parcel no. Loc. 20/GITHURI/916 with the Appellant's father Njoroge Mwangi now deceased for a consideration of Kenya Shillings Six Thousand (Ksh. 6000) pursuant to the sale agreement land was transferred to the plaintiff father and title deed issued on 19th August 1987 vide a court order in Arbitration No. 45 of 1983 at Murang'a.

It is further not in dispute that the said order of arbitration was set aside on 20th November 1995 on review and the title reverted back to the Respondent. The question which the court need to answer and which the trial court attempted to answer is what was the net effect of the setting aside of the arbitration order?

The Appellant in his submission has stated that the lower court while setting aside the award and judgment in the arbitration cause advised the Appellant father to file a proper suit in court? What should have been the proper suit for the Appellant's father to have filed and did the Appellant file the proper suit before the trial court for determination?

In answering the first question to my mind the parties were put to back into the position they were at as at 30th July 1982 and therefore what the Appellant should have done as advised by the lower court would have been to move the court for an order of specific performance of the said contract of sale and to have the Respondent transfer the said land to him.

This to my mind is the position taken by the Respondent in this submissions when he submits that the plaintiff cause of action is clearly build on contract and therefore the cause of action cannot be brought after six years from the date on which the cause of action accrued which according to the Respondent and as conferred by the Appellant in his pleading and evidence before the lower court was on 30th July 1982. He therefore supports the learned magistrate's holding that the action was time barred in the year 2004 when the suit was filed.

The Appellant's position as stated in his submissions is that the cause of action started to run as at 23rd October 1997 when the title deed was reissued in the name of the respondent. He further submits that the Appellant was reclaiming land back from the Respondent and therefore the proper section of the law should have been section 7 of the Limitation of Actions Act which states:

"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"

Suppose this honourable court was to take the Appellant's submission that the limitation period is twelve years as opposed to six years as stated by the Respondent, the question again to be asked is when did the right of action accrue to the Appellant's father?

To my mind the right of action accrued to the same as at when the Respondent's father defaulted in transferring the land to him and having taken a faulty proceedings to have his rights conferred, it is my considered opinion that the Appellant could not rely on rights which were conferred by a faulty procedure and therefore he could only enforce his rights based upon the sales agreement which is not disputed.

Since parties are bound by the pleadings the Appellant can not now run away from his pleadings and evidence before the learned trial magistrate and therefore based on evidence adduced before the honourable court the finding on the issue of limitation can not be faulted.

Suppose this honourable court is wrong on the finding of the trial magistrate that the cause of action was based on contract and hold that it was based on recovery of land where it is twelve years would this

have an effect on the appeal? It is still the courts considered opinion that the said twelve years would have also started from 1983 when the Respondent defaulted and therefore the Appellant would still have been time barred. Since the proceedings of arbitration were faulted by the lower court the Appellant can not claim any rights which were allegedly conferred upon him by the same.

In the final analysis the appeal herein has no merit and is therefore dismissed with costs to the respondent.

Dated and delivered at Nyeri this 4th day of November 2011.

J. WAKIAGA
JUDGE