



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 89 of 2006

**MICHAEL MURIUKI MURINDIAPPELLANT
VERSUS
LAWRENCE NGIGOYA GICHERU.....RESPONDENT
(Being an appeal against the judgment in Maua Civil Suit No. 123 of 2003
dated 18/8/2006 delivered by Honourable B. Ochoi)**

JUDGMENT

The appellant filed a claim in PMCC Maua being civil case No. 123 of 2003. In his plaint, he pleaded that by oral agreement made in 1992 between himself and the respondent it was agreed that plot number 13 *Kianderi Market, Kirinyaga* which belonged to the appellant's father Murindi Ngure but which he was to inherit at the death of his father was to be exchanged with the respondent's parcel number 1867 *Amungenti (A)* Adjudication section. That it was the appellant who instructed his father to transfer the market plot to the respondent. In furtherance to that agreement, the appellant pleaded that the respondent wrote a letter to the adjudication officer of *Amungenti (A)* adjudication section. By that letter, the respondent authorized the adjudication officer to transfer the land to the appellant and the said transfer was to be noted in the register. In furtherance to that agreement, the market plot was transferred to the respondent by the appellant's father on the appellant's instructions. The appellant further pleaded in his plaint that in February 2000 he tried to take actual possession of the parcel in *Amungenti* and it transpired to him that it did not exist. He therefore prayed that the court would order the respondent to transfer back to him the plot at *Kianderi market*. The respondent in his defence denied the appellant's claim and pleaded that his claim was statute barred. He also pleaded that the claim did not raise a reasonable cause of action. The lower court in its judgment dismissed the appellant's case. The appellant has filed this appeal against the said dismissal. Parties in their submissions in considering the grounds of appeal considered ground 1 and 2 together. I too intend to consider them together. Those grounds are as follows:-

1. ***That the learned resident magistrate erred in law and in fact in holding that the appellant had not established a cause of action against the respondent.***
2. ***The learned resident magistrate erred in law and infact in holding that the appellant had no locus standi to institute the suit in the lower court.***

I will begin by considering the 2nd ground first. The appellant in his plaint and his evidence as well as the evidence of PW2 and of the respondent stated that the *Kianderi market* plot belonged to the appellant's father. The father of the appellant by the time the suit in the lower court was filed was deceased. The appellant therefore in my view, was essentially filing that lower court claim on behalf of the estate of his late father. I say so because when the *Kianderi Market* plot was transferred to the respondent, it was transferred by the appellant's father and at that time, it was registered in the appellant's father's name. If the appellant was not acting on behalf of his late father's estate and if it were to be accepted as he stated in the plaint, that he was an heir of his father's estate, he needed just as much as if he was acting on behalf of the estate of his late father to have obtained a grant of letters of administration authorizing him to file the action. This is because at no time did the appellant have the *Kianderi market* plot in his name. Legal rights are not plucked in the air. They are acquired as recognized by law. Section 82 of the Law of Succession Act provides that it is only personal representatives of the estate of a deceased person who can enforce by suit all causes of action that survived the deceased. Therefore I find that ground number 2 fails. The lower court was right to have found that the appellant had no *Locus standi* in filing the suit. Of course, having made that finding it then follows that the appellant had no cause of action against the respondent. Cause of action can be defined as a collection of facts which if found to be true would entitle a party to be awarded a remedy from the opposite party. As stated before, the appellant pleaded that he agreed with the respondent to exchange the market plot with the parcel of land at *Amungenti*. In evidence, the appellant accepted that the market plot had never been in his name. He said that when he went to the land office after that transaction between his father and the respondent, he confirmed that the *Amungenti* property had been transferred to his name. On being cross examined, on when he discovered that the parcel of land at *Amungenti* did not exist he stated:-

“Later, in 1992, December I went to land office and found the shamba was in my name. I went to the shamba in 1996 and chased (sic) away. From 1992 I used to go and watch and go back..... Between 1992 and 1996 some people were using the shamba. I do not know those people.”

That testimony needs to be considered alongside what is pleaded in the plaint. The appellant in the plaint pleaded thus:-

“It then transpired that the said parcel of land did not exist on the ground but existed only in the defendant (respondent) imagination.”

The property he referred to in the plaint was the *Amungenti* property. Looking at the appellant's oral testimony and his pleading it is clear that there is inconsistency. Further, the appellant's own witnesses PW3 who was the land adjudication officer said that his record showed the appellant was the registered owner of the *Amungenti* property initially. Following a letter that he, the appellant wrote to the adjudication officer he authorized the parcel of land at *Amungenti* to be registered in the name of Richard Ndege. Richard Ndege was PW2. PW2 stated that following the transaction between the respondent and the appellant's late father, he accompanied the appellant on the *Amungenti* property in 1993 but they were chased away. The appellant and his witnesses' evidence bears clear contradictions. That contradiction clearly shows that the appellant had no cause of action against the respondent. Accordingly, ground 1 of appeal fails. The appellant's ground 3 is in the following terms:-

3. ***That the learned resident magistrate erred in law and infact in holding that the claim was time barred by dint of the provisions***

of the Limitations of Action Act Cap 22 Laws of Kenya.

The appellant continued to contradict himself even on dates and events that occurred. It is not entirely clear which date certain events occurred. His plaint was filed on 11th July 2003. In the plaint, the appellant stated that it was not until the year 2000 that he discovered that the *Amungenti* property did not exist. He did not support that date in his evidence. In evidence, he said he was chased away from the land in 1996. If that is so, the limitation period in a claim under contract is 6 years. See Section 4 of the Law of Limitation of Actions Act. By virtue of that section, the appellant's claim which was in contract became time barred in the year 2002. On the other hand, PW2 said that they were chased away from the land in 1993. If that is the correct date, then indeed the appellant's claim was time barred. It was filed in excess of 6 years. That ground also fails. Ground 4 is in the following terms:-

4. that the learned resident magistrate erred in law and infact in holding that consent to institute the suit was necessary under Section 30 of Cap 284 Laws of Kenya.

Section 30 (1) of the Land Adjudication Act Cap 484 is in the following terms:-

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.” (Underlining mine).

The underlined part of that sub section will assist to determine whether a consent in this case was required. The appellant in his claim stated that *Amungenti* which was still under adjudication had not been transferred to him and for that reason, he sought that the respondent would re-transfer the market plot to him. For the court to adjudicate on the appellant's claim, it would undoubtedly have to consider what interest, if any, the appellant had under land which is not adjudicated, that is, the *Amungenti* property. That being so, the appellant should have obtained consent from the land adjudication officer. Failure to get that consent rendered his claim incompetent. Having evaluated the evidence of the lower court I find that the learned magistrate cannot be faulted for dismissing the appellant case. I find that this appeal has no merit and I dismiss it with costs to the respondent.

Dated and delivered at Meru this 21st day of May 2010.

MARY KASANGO

JUDGE