



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 239 of 2004

FRANCIS D. KINUTHIA.....1ST APPELLANT
MARGARET WAMBUI JOB.....2ND APPELLANT
JANE NYAGUTHIE.....3RD APPELLANT
VERSUS
NELSON MACHARIA.....RESPONDENT
(An appeal from the Judgment and Decree in
Molo SNR.R.M.C.C.NO.11 of 2003 by Hon. R. K. Kirui,
Senior Resident Magistrate, Molo, dated 29th September, 2004)

JUDGMENT

The three appellants in this appeal sued the respondent in **Molo Senior Resident Magistrate Civil Suit No.11 of 2003** for orders:

- 1 that the respondent be compelled to execute transfer documents in respect of three parcels of land sold to the appellants
- 2 that the respondent be ordered to give the appellants the complete acreage of the parcels purchased by the plaintiffs or refund the equivalent in value of the shortfall in the size.
- 3 that the respondent be restrain from clearing trees or in anyway interfering with trees in the three parcels.

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The respondent denied the allegations against him and asked the court below to dismiss the suit.

After a full trial, the learned magistrate R. K. Kirui, Senior Resident Magistrate dismissed the suit for:

- 1 lack of Land Control Board's consent
- 2 being statute-barred
- 3 lack of *locus standi* by the 3rd appellant
- 4 failure by the appellants to pay the full purchase price
- 5 failure to plead adverse possession

The dismissal aggrieved the appellants who have now brought this appeal to challenge the judgment on eight (8)

grounds which can be summarised as follows:

- 1 that the trial court erred in dismissing the suit for failure by the appellants to prove their claim
- 2 that the court erred in finding that the appellants had not fully paid the purchase price.
- 3 that the learned magistrate erred in holding that the suit was statute-barred
- 4 that the trial court erred in failing to find that failure to obtain the Land Control Board's consent was caused by the respondent
- 5 that the learned magistrate erred in failing to find that the appellants were entitled to their parcels of land by way of adverse possession
- 6 that the learned magistrate failed to appreciate the appellants' evidence
- 7 that the lower court misguided itself on the law of adverse possession and the Land Control Act
- 8 that the court failed to see the contradictions in the respondent's case.

Learned counsel for the respondent maintained that the learned trial magistrate correctly dismissed the suit as the appellants failed to prove their claim. Both sides relied on authorities which I have considered.

From the evidence, it is plain that the respondent sold three parcels of land to three purchasers. For instance on 6th April, 1988 he sold to the 2nd appellant Margaret Wambui Job, three acres of an unspecified parcel of land. On 29th May, 1989 he sold to Patrick F. Kariuki Gitahi two (2) acres of plot No.159. Finally, on 2nd April, 1991, the respondent sold to Francis D. Kinuthia Thiong'o two (2) acres of plot No.505/159 at Muchorui - Molo.

Apart from the transaction of 1989, the purchase price in respect of other two transactions were not fully paid with an outstanding balance of Kshs.5,000/= in each case. It is also common ground that the sale in respect of that transaction of 1989 involved the respondent and Patrick F. Kariuki Gitahi as the purchaser. The claim has been brought by Anne Nyaguthie Muruthi, the 3rd respondent, who testified in the lower court as P.W.3. It was her evidence that her husband, Patrick purchased the parcel of land in question. That the said Patrick died in 1995 and a grant of representation issued to his brother, P.W.4 Peter Githongori Githae.

The third matter relates to the Land Control Board consent. It is not denied that the parcels are agricultural land. It is equally conceded that no consent was obtained from the relevant control board. Finally, the appellants made specific prayers in the plaint. The appeal must be determined on the above issues.

The first transaction of 6th April, 1988 is evidenced by a document in Kiswahili language. It does not describe the property being sold. The plaint, similarly does not specify the property in question. **Order 7 rule 3** of the **Civil Procedure Rules** proves that:

“3. Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it.”

Secondly the balance of Kshs.5,200/= was not settled. The Kiswahili agreement does not specify the condition upon which i

was to be paid. It follows therefore that the transaction was incomplete.

Similarly there is no evidence that the balance of Kshs.5,000/= in respect of the transaction of 2nd April, 1991 was settled. The learned trial magistrate also made a finding of fact that the three parcels were agricultural land. In terms of

sections 6 & 8 of the **Land Control Act**, the parties ought to have applied within six (6) months of the making of the agreement and obtained consent of the Land Control Board. The six months expired and there was no application to the High Court for extension of time. In the circumstances **section 6** aforesaid declares that failure to obtain the board's consent renders the transaction void for all purposes. See **Onyango & Another Vs. Luwayi** (1986) KLR 513.

There is no mandatory requirement that only the seller must apply to the board for the sale. Furthermore there is no specific instance where the respondent refused to apply for consent. In the absence of a consent, the appellants' only remedy lay in the recovery of the consideration paid to the respondent.

Were the appellants qualified to a declaration that they are entitled to adverse possession? To begin with, adverse possession has not been pleaded. Although from recent court decisions, the requirement that a claim based on adverse possession ought to be brought by originating summons seem to be relaxed, it is noted that

this action was not commenced by originating summons. But more fundamentally such a claim, by dint of **section 38(1)** of the **Limitation of Actions Act** can only be made to the High Court.

Regarding the 3rd appellant's claim, it is apparent that the same is based on the fact that her late husband, Patrick purchased the same from the respondent. There is evidence that the said Patrick is deceased and grant of letters of administration has been issued to Peter Githongori Githae and not the 3rd appellant. In the circumstances, the 3rd appellant not being the administratrix of the estate of the deceased could not maintain an action to recover the land in question. There was no prayer for a refund of the purchase price hence the learned magistrate could not make any such order. The orders sought in the plaint, in the circumstances, could not be granted and for those reasons this appeal fails. It is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 24th day of June, 2010.

W. OUKO
JUDGE