



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 62 OF 1985

SATIMA PEAK FARMERS CO. LTD.....PLAINTIFF

VERSUS

ONESMUS WERU S/O GICHAHI (deceased)1ST DEFENDANT

TARCISIUS NDERITU (deceased).....2ND DEFENDANT

WILLIAM GACHAI).....3RD DEFENDANT

JAMES GITONGA WERU.....4TH DEFENDANT

JOHN NDERITU WAGURA & 2 OTHERS.....INTERESTED PARTIES

J U D G M E N T

This suit has had a chequered history. As the record will no doubt show, it was filed in court sometimes in 1985. Thereafter several applications were filed, considered and rulings made thereon. However it was not until 24th January, 2006 that the hearing of the suit proper commenced before Okwengu J. Midway through the evidence of the plaintiff, however, it was discovered that the 1st defendant had passed on many years ago, 20 years to be precise. Accordingly the case was stood over to enable substitution, if necessary to be undertaken. The matter thereafter remained in limbo until when it next came up for hearing before Kasango J. on 1st December, 2008. The deceased defendant aforesaid had not been substituted. On this day though the plaintiff who had earlier on been in court, had for unexplained reasons absconded by the time that the case was called out for hearing. Considering the age of the case and to obviate unnecessary further delay in the hearing and final determination of the case, parties agreed by consent to have the matter disposed off by way of the affidavits on record as well as written submissions. It also came to pass that the 2nd defendant had passed on as well. The case was then set down for submissions on 20th January, 2001.

However, come that day and an application had been filed by intended interested party namely James Gitonga Weru to be enjoined in the proceedings. He was the son of the deceased 1st defendant. Though the application was strenuously resisted by other parties, Kasango J. nonetheless in a ruling dated 10th February, 2009 allowed the application. James Gitonga Weru was thus enjoined in the suit not as an interested party as he had sought but as a 4th defendant. The suit was then adjourned to 2nd March, 2009 for further directions as regards its hearing. On this occasion parties consented further that the suit be heard by way of written as well as oral submissions. For this purpose it was stood over to 27th April,

2009. On this date, Kasango J. could not hear the matter further as she was on transfer to the High Court of Kenya at Meru. She directed instead that the suit be mentioned before me on 8th June, 2009 for further directions.

On 8th June, 2009 all the parties agreed by consent that I proceed from where Kasango J. had left. In other words that I should read the pleadings and the written submissions on record and thereafter proceed to prepare the judgment. It would appear that the parties had abandoned the oral submissions aspect of the case. So much for the history of the suit.

What then is the genesis of this dispute? By an originating summons dated 12th April, 1985 and filed in court on the same day, Satima Peak Farmers Company Limited, hereinafter referred to as "*the plaintiff*", sought as against Onesmas Weru S/O Gichahi, Taracisius Nderitu and William Gachai hereinafter referred to as "*the defendants*" the determination of the following questions.

"1. That the plaintiffs are the rightful owners of 477 acres out of the sub-divisional portion of land reference 3381 measuring 983 acres in the Nyeri District pursuant to agreements in writing dated 8th day of June 1973 and 25th day of June 1973.

2. That this Honourable court enlarge time to obtain the Land Control Board from the Nyeri Kiganjo Land Control Board, Nyeri and order that defendants sign all relevant forms failing which Executive Officer 1 of this court be empowered to do so.

3. That this honourable court issue to the Surveyor of the Survey of Lands, Land Office, Nyeri a temporary injunction restraining, him from sub-dividing the parcel of land contained in L.R. 3881 until this court has determined the issue contained in paragraph 1 hereof and has given proper discretions (sic) at (sic) to its sub-division.

4. That the costs for this application be provided for."

The originating summons hereinafter referred to as 'O.S' was expressed to be brought under orders XXXVI rule 3, 5 & 12, and XXXIX rules 1 and 9 of the Civil Procedure Rules, section 8 of the Land Control Act, and all other enabling provisions of the law.

In the affidavit in support of the application the plaintiff deponed that it had a membership of 540. In or about 8th day of June, 1973 the defendants entered into a written agreement of sale with the plaintiff in which the defendants agreed to sell 450 acres out of their parcel of land known as LR.3381 Amboni measuring about 983 acres at an agreed purchase price of Ksh.135,000/= which was duly paid. On about 25th June, 1973, the defendants under a supplementary agreement offered to sell an additional 27 acres to the plaintiff for Ksh.8,100/= out of the same suit premises which amount was again duly paid. Thereafter the plaintiff and its members were allowed and or permitted to enter upon the portion of the suit premises bought as aforesaid and commenced developments thereon. However no consent of the then Nyeri/Kiganjo Land Control Board to the transaction was obtained. However this was not due to the default, neglect or omission on the part of the plaintiff as it had done all that was required of it with regard to the transaction. The defendants were however fully to blame for the fiasco. Under section 8 of the Land Control Act as amended, this court had power to extend the period in which the application for such consent can be made upon sufficient reasons and upon such conditions as it may think fit. The defendants have to date not yet transferred the 477 acres sold to the plaintiff as aforesaid.

In response, the 2nd defendant swore a replying affidavit. In pertinent paragraphs, he deponed that the agreement between them was subject to the following terms and conditions:-

(a) That the settlement fund trustees would consent to the plaintiff paying the remaining balance of the loan secured by the said land parcel No.LR.No.3381.

(b) The plaintiff would refund the 1st and 2nd defendants Kshs.30,000/= being expenses incurred by

them in developing the portion that the plaintiff's members occupied.

(c) The subdivision of the said land and the occupation thereof was subject to other group's acceptance of their respective pieces of land as per the supplementary agreement between the plaintiff and the defendants.

However the consent to the transaction could not be obtained which was also had interest in the suit premises had filed a Civil Suit against the defendants being Nairobi HCCC No.1473 of 1973. Mukoi was successful in the suit and the court ruled that the suit premises be given to Mukoi Farmers Co. Ltd. Owing to the confusion created by the said judgment, the provincial administration, Central Province entered the fray with a view to resolving the dispute between Mukoi Farmers, the plaintiff and the defendants. Meetings were held on 22nd October, 1984 and 6th December, 1984 respectively between the said parties and it was resolved that all purchase agreements hitherto entered into be cancelled. Instead a seven man committee was constituted representing all the groups involved for purposes of subdivision. The plaintiff agreed to give back 100 acres from their portion in return for 227.3 acres. It was therefore not true that the plaintiff was to get 477 acres as claimed but only 227 acres, the 2nd defendant further averred. As far as the defendants were concerned therefore, the dispute was administratively resolved and this case was thus unmerited and ought to be dismissed.

Since the filing of the suit however and as already stated, the 1st and 2nd defendants had passed on. They have never been substituted. So that as of now it is only the 3rd defendant who is still alive. However, the son of the 1st defendant deceased has since been enjoined in the proceedings as the 4th defendant. On 11th April, 2002, 8 interested parties led by John Nderitu Wagura ideally Mukoi Farmers Co. Ltd filed an application seeking that they be enjoined in these proceedings. That application was on 16th July, 2004 heard by the Deputy Registrar of this court and allowed. As of now therefore the suit is against the 3rd, and 4th defendants as well as the 8 interested parties.

On 25th May, 2005, John Nderitu Wagura, the 1st interested party swore an affidavit in response to the O.S. He denied that the plaintiffs were the rightful owners of 477 acres of the subdivision of the suit premises because the two sale agreements were defective as they lacked the signature of the 3rd defendant and it was for that reason that the consent to the transaction was not given. That prayer 2 of the O.S cannot be granted as courts do not make agreements for parties and the defendants have no legal interest in the suit premises having sold the same to the interested parties, i.e. Mukoi Farmers Co. Ltd who obtained judgment against them and also a vesting order in HCCC No.1473 of 1973. Prayer 3 had been overtaken by events as the entire suit premises had been subdivided and new titles issued. As for the prayer for extension of time, he stated that such prayer is not available and even if it was, no discretion can be exercised by court to extend time after twenty five years or so, and this being an equitable remedy that delay alone militate against, the granting of the prayer.

The affidavit of the 1st interested party in support of their application to be enjoined in the proceedings seems to me to capture the main issues in this suit; and seems to be this. The suit premises, it would appear no longer exists as it was surrendered to the Government by Mukoi Farmers Co. Ltd following the High Court order in HCCC No.1473 of 1973 that the suit premises be vested in the Mukoi Farmer Co. Ltd. On 28th March, 1984, a vesting order in those terms was made. The defendant's attempt to appeal against the said judgment was nibbed in the bud when the court of appeal denied them extension of time to file the appeal out of time.

On 24th September, 1992 arbitration proceedings involving the plaintiff, Mukoi Farmers Co. Ltd and the defendants were conducted by the Provincial Administration, Central Province and a formular regarding apportionment of 983 acres agreed upon. All the parties except the plaintiff endorsed the formular. On 30th November, 1992, the District commissioner Nyeri wrote to the District Land Registrar advising him to issue title deeds for the new land reference Mwiyo/Labura Block 11 (Mukoi) to the eligible owners. On 27th January, 1994, the Nyeri District Land Registrar wrote to the Chief Land Registrar Nairobi concerning land reference No.3381 now known as Mwiyo/Labura Block 11 (Mukoi) advising him that

the said parcel of land was originally owned by the defendants who had sold it to Mukoi Farmers Co. Ltd in 1969. The defendants later sold the same land to other people including the plaintiff. Subsequently original defendants disagreed with Mukoi Farmers Co. Ltd over the transfer of title leading to Mukoi Farmers Co. Ltd successfully instituting the suit HCCC No.1473 of 1973 against them. On 1st September, 1990, the interested party on behalf of Mukoi Farmers Co. Ltd commissioned Messrs Gatome & Associates Surveyors to subdivide the suit premises. Pursuant to the authority given by the chairman of the Central Authority the suit premises were subdivided into 199 portions, subject to the head title being surrendered to the government in exchange of the new freehold titles. The head title was eventually surrendered, survey and subdivision carried out and the suit premises was given a new reference number LR.Mwiyogo/Labura Block 11(Mukoi). On 22nd December, 1992 fresh titles were issued. In view of the foregoing uncontested facts it was the contention of the interested parties that the original land reference No.3381 Mweiga was non-existent in view of the surrender and re-grant upon subdivision as stated above. The initial agreement between the plaintiff and the 1st & 2nd defendants was a nullity for want of consent of the appropriate land control board.

There other several affidavits on record which I have carefully read and considered. Due to the complexities, sensibilities and animosities exhibited in this case, it would appear that parties and their respective advocates were unable to agree on the issues for determination by this court. Accordingly the court determined that parties file their respective issues for determination. As a result of the said order parties filed their respective issues which I have carefully read and considered. One thing that I must point out is that those issues clearly missed the point and were heavy with unnecessary and extraneous matters. The issues were framed as though there were counterclaims in the O.S. How possibly can their be a counterclaim in an O.S. In event every O.S will have issues already framed for determination by court. For me, I think I would adopt the issues for determination in this O.S being those on the face of the O.S. After all for all the 24 years that the O.S has been pending in this court, the plaintiff did not see the need to amend the same to bring it in tandem with the prevailing situation and or circumstances.

The 1st issue for determination is whether the plaintiff is the rightful owner of 477 acres out of the sub-divisional portion of land reference 3381 pursuant to the agreements in writing dated 8th June, 1973 and 25th June, 1973 respectively. As understand it these agreements were in respect of the suit premises then existing. This then calls into being section 3 (3) of the Law of Contract Act which provides in mandatory terms that:

“.....No suit shall be brought upon a contract for the disposition of an interest in land unless (a) the contract upon which the suit is founded is (i) in writing (ii) is signed by all the parties thereto.....”

The initial suit premises were in the names of the 1st, 2nd and 3rd defendants as tenants in common in equal shares. It is common ground however that the two sale agreements were only executed by the 1st and 2nd defendants to the exclusion of the 3rd defendant as vendors. It would appear therefore that the purported sale agreements were in violation of section 3 (3) (ii) of the Law of Contract aforesaid. The 3rd defendant has categorically stated that he was not a party to the transaction, was never consulted nor his consent to the transaction sought and obtained. Neither did he receive the consideration or a portion thereof. It would appear therefore that under the circumstances no valid legal agreement for the sale of the suit premises or any party thereof could have been effected without the consent and signatures of all the tenants in common. Indeed one of the reasons for failure to obtain consent to the transaction from the relevant Land Control Board was because the 3rd defendant had failed to sign the application form as the suit premises were registered in the joint names of the 3 defendants yet only the 1st and 2nd defendants had signed.

The 4th defendant has submitted that the initial 3 defendants incorporated themselves in to Wendinga farm and formed a partnership to oversee their affairs in the suit premises. There is a partnership deed dated 10th September, 1962. The main features of the said Partnership Deed and relevant to these proceedings were that;

“a) The farm (suit property) shall be divided among the partners after repaying all the loans to the Settlement Fund Trustee.

b) Each partner shall get shares equivalent to his capital brought unless any debit owed to the farm and/or any other original owner.

c) If a partner will not have any money as capital he will have no shares in farm.

d) If the partnership will be unable to run the farm property, the loan shall be divided into three equal shares and each partner shall continue paying until completion (paragraph 3 of the Partnership deed).

e) Any partner unable to pay this loan or credit to the farm will be expelled by other partners from the farm.

f) If the partners are unable to repay the loan and they invite other persons to repay the loan, such new parties shall be entitled to a share the land only.

g) This partnership deed was duly signed by the parties and become binding.”

By 1963 December, differences had cropped up among the partners. Clause d aforesaid was accordingly invoked. The assets according to the 4th defendant were divided into three shares together with the balance of the loan and each partner was to organize on how to repay his share of the loan. The 3rd defendant was unable to pay and actually moved out of the suit premises with his entire family in August 1968. By this conduct according to the 4th defendant, the 3rd defendant ceased to be a member of the partnership in terms of the partnership deed. He therefore ceased to be a partner as at that time and therefore it was not necessary that he should have executed the two agreements of sale between the plaintiff, 1st and 2nd defendants. Accordingly the agreements as executed by the 1st and 2nd defendants in his absence were valid and binding between the parties. These submissions cannot be possibly correct. First and foremost there is no evidence that the 3rd defendant allegedly quit the partnership and even if he had done so, the same was thereby dissolved. Neither did it have a clause to that effect. Indeed there is even no evidence of the alleged expulsion of the 3rd defendant by the 2 defendants. Further if it was true that the 3rd defendant had ceased to be a partner as claimed by the 4th defendant why did the plaintiff enjoin him in the proceedings yet it was aware that the 3rd defendant had never executed any of the two agreements! In any event the issue of the expulsion of the 3rd defendant from the partnership has been raised by the 4th defendant who is not even a partner himself. Even if we were to accept that indeed the 3rd defendant had ceased to be a partner, that information had not been relayed to the registrar of titles. Indeed as at the time the alleged agreements were entered into, the suit premises were still registered in the joint names of the three defendants as tenants in common. Consequently it was a legal requirement that any sale agreement should have been executed by all the three co-owners of the suit premises.

On the basis of the sale agreements aforesaid which as already indicated were not executed by all the parties, it is my finding that any sale agreement of the suit premises or a portion thereof should have been executed by all the 3 defendants as the same was still registered in their joint names. The fact that the 3rd defendant did not execute the sale agreement entered into between the 1st and 2nd defendant on one hand and the plaintiff on the other hand invalidates the whole transaction. Small wonder that the land control board declined to grant its consent to the transaction for that very reason.

I now wish to consider the issue of the consent to the transaction or lack of it by the relevant Land Control Board. It is common ground that the suit premises were agricultural land. Accordingly by virtue of the Land control Act section 6 thereof, the transaction being one of sale and transfer, the consent of the relevant Land Control Board was absolutely mandatory. If no such consent was obtained within a specified period of time, the transaction became void for all intents and purposes. It is common ground that no such consent was obtained with regard to this transaction. Indeed that fact is demonstrated by the

plaintiff's 2nd prayer in O.S in which it seeks enlargement of time to enable it obtain the consent of Nyeri-Kiganjo Land Control Board. Further the supporting affidavit of the O.S confirms that indeed no such consent was obtained though it was sought for. Further the said board by its letter dated 15th February, 1974 declined to give its consent so as to effectuate the 2 agreements aforesaid on the grounds that the 3rd defendant had not signed the application forms amongst other reasons. The plaintiff too seems to have appreciated the need for the consent to the transaction. In its written submissions on the issue it has stated that;

“.....the agreements of sale entered into by the plaintiff are valid as to 477 acres and they are entitled to the orders sought in the O.S and although para.2 request for extension of time to enable for (sic) consent it is now submitted that section 6 (3) (b) applies and the transaction does not require consent.....”

What the plaintiff is really saying is that initially it had been of the view that the transaction required the consent of the relevant land control board. However it has since learned that such consent was unnecessary since settlement fund trustees were involved in the transaction as well.

Section 6(2) (b) of the Land Control Act provides that a transaction to which the Government or settlement fund trustees or (in respect of trust land) a county council shall not be subject to the provision voiding a land transaction for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has been given. However I do not think that the plaintiff can avail itself of this remedy for the simple reason that the settlement fund trustees involvement in transaction was with the three defendants and not the plaintiff. As part of the purchase price, the defendant requested the plaintiff to settle on their behalf the debt that they owed the settlement fund trustees. The plaintiff was paying the money not on its own behalf as a party having transaction with settlement fund trustees but on behalf of the defendants. The story would perhaps have been different had the transaction been between the plaintiff and settlement fund trustees directly. For all the foregoing reasons, I would hold in answer to the issue number 1 of the O.S on this score, that the plaintiff is not the rightful owner of 477 acres out of the sub-divisional portion of land reference 3381 measuring 983 acres pursuant to the agreements in writing dated 8th day of June, 1973 and 25th June, 1973 respectively. Yes members of the plaintiff may be in occupation of a portion of the suit premises. However they entered the same without the consent of all the defendants. Accordingly the doctrine of part performance does not apply. In any event such doctrine is no longer applicable as it was done away with by Act Number 2 of 2002. In any event the plaintiff still has a remedy against the estates of the deceased defendants under section 7 of the Land Control Act. Any money paid in the course of a controlled transaction that becomes void is recoverable as a debt by the person who paid it from the person to whom he paid.

Issue number 2 is whether I should exercise my discretion under section 8(1) of the Land Control Act and extend time within which to apply for the consent of the Land Control Act? To my mind that will be an exercise in futility as the 3rd defendant will still have not executed the sale agreements nor will he be willing to sign the application forms. This court cannot compel him to do any of the above acts. Secondly, the other defendants have since passed on and it is not clear whether letters of administration have been obtained in respect of their estates. Thirdly, the plaintiff appears in any event to have abandoned that prayer since in its view the transaction involved settlement fund trustees and therefore the requirement that the consent of the land control board be obtained within 6 months of the execution of the sale agreement was inapplicable. In view of the developments after the plaintiff entered into the alleged agreement such as the interested parties successfully suing the defendants and obtaining judgment, decree and vesting order of the entire suit premises enlargement of time will be of no assistance to the plaintiff either. Finally, I would still hold that on the material placed before, I discern no sufficient reason as would have compelled me to exercise my discretion in favour of the plaintiff. The delay is inordinate.

Issue number 3 in the O.S has since been overtaken by events and therefore does not fall for consideration.

The plaintiff brought this O.S pursuant to the provisions of order XXXVI rules 3, 5 & 12 of the Civil Procedure Rules. Rule 3 gives right to a vendor or purchaser to take out an originating summons for the

determination of any question which may arise in respect of any requisition or objection, or any claim for compensation; or another question arising out of or connected with contract of sale (not being a question affecting the existence or validity of the contract). Having considered the O.S, the affidavits in support and opposition thereof as well as the respective written submissions, I am far from being persuaded that the O.S was properly laid before this case. The question affecting the existence or validity of the contract of sale is directly in focus. The issues raised have nothing to do with requisitions or objections or any claim to compensation. Accordingly the entire O.S would appear to me to be incompetent. Rule 5 deals with summons by persons interested in deeds or wills. Hence it is inapplicable to the circumstances of this case. Rule 12 of course deals with procedure. The plaintiff cannot be faulted on this.

The defendants and interested parties have raised the question of adverse possession. I do not think that the plaintiff raised the issue in its O.S. There is no counterclaim filed raising the issue. In any event there can be no counterclaim in an O.S since by its very nature an O.S always contains questions or issues for the determination by court. In any event even if adverse possession had been pleaded, I do not think that it would have been available as a remedy. There is unchallenged evidence that land reference No.3381 no longer exists, the same having been surrendered to Government by Mukoi Farm Limited. Pursuant to that surrender, the suit premises were subsequently surveyed and subdivided and the suit premises given a new reference number being LR. Mwiyo/Labura Block 11 (Mukoi). The 4th defendant admits that much but states that the subsequent title deeds, upon which the interested parties are relying, were issued under questionable circumstances whose validity is a subject of investigations by the Chief Registrar of Titles, Nairobi. Yes, the titles may have been obtained as aforesaid. However that does not change the situation on the ground that LR.3381 is no longer in existence. An order of adverse possession cannot issue against a non-existent parcel of land. Besides even if I was to consider the alleged acquisition of title by adverse possession by either the 4th defendant or the plaintiff, there were several interruptions to their continued occupation of the suit premises so that it cannot be claimed that their occupation was continuous and uninterrupted. The case filed by Mukoi Farm Ltd against the defendants and the resultant decree and vesting order is one such interruption. Then there was the intervention by the provincial administration. Finally even the date when the plaintiff entered the suit premises is unknown.

For all the foregoing reasons I am satisfied that the O.S has no merits and its accordingly dismissed with costs to the 3rd defendant.

Dated and delivered at Nyeri this 22nd day of June, 2009.

M.S.A. MAKHANDIA

JUDGE