



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

Civil Appeal 71 of 1998

M'RINGERA M'NYANGE APPELLANT

VERSUS

M'MURUNGI M'NGATUNYI RESPONDENT

(An appeal from a judgment of N. Ithiga S.P.M. Meru dated 18th January 2002)

JUDGMENT

The genesis of this appeal briefly stated is that the appellant and the respondent were shareholders in a land buying company, Katheri Farmers Company Ltd, where according to the respondent, he held 3 acres of land while the appellant held 2 ½ acres.

It is the respondent's case that in 1979 he entered into an oral agreement with the appellant wherein it was agreed that he (the respondent) would surrender his 3 acres at the Katheri farm in exchange with the appellant's 3 acres to be acquired by Katheri Farmers Co. Ltd at Kisima Farm.

To this end the two exchanged receipts in respect of the two farms and the appellant consolidated the 3 acres from the respondent with his 2 ½ acres at Katheri farm to make Plot No. 1160.

Further, the respondent maintained that it was a term of their oral agreement that should Katheri Farmers Co. Ltd fail to acquire Kisima Farm, the appellant would surrender the respondent's 3 acres at Katheri Farm. As fate would have it, Katheri Farmers Co. Ltd failed

to acquire Kisima Farm and naturally the respondent expected the applicant to surrender to him the 3 acres as agreed verbally. But that was never to be as the appellant flatly refused to surrender the land prompting the suit which has given rise to this appeal.

After a full trial where the respondent called three witnesses while the appellant was the only witness on his side, the trial court found that the respondent was entitled to the three (3) acres in question. The appellant on his part maintained that it was Katheri Farmers Co. Ltd that asked shareholders who were interested in buying shares in the Kisima Farm to do so through it.

Through Katheri Farmers Co. Ltd, the appellant paid for 3 acres which he surrendered to Katheri Farmers Co. Ltd in exchange of 3 acres at Katheri Farm. He admitted that the latter 3 acres belonged to the respondent. That when the sale of Kisima Farm failed the shareholders who had paid had refund made to them.

He was categorical that he did not owe the respondent any land. He was therefore aggrieved by the lower court's decision directing him to surrender three (3) acres from PLOT NO. 1160 Katheri Farm, hence this appeal. He raises six grounds, which were argued before me on 31st January 2008.

The appellant has challenged the judgment arguing that the suit was barred by the statute of limitation whether it is considered as a suit to recover land or a suit based on contract as the cause of action arose in 1979 while the suit was filed on 7th January 1994. To buttress the submissions on this point the case of **Javed Iqbal Abdul Rahman and Adila Ali Bashir V. Bernard Wekesa Sambu and Another**, Civil Appeal No. 11 of 2001, was cited.

The second ground of appeal is to the effect that since Katheri Farmers Co. Ltd was a party to

the agreement, the failure to join it in the suit was fatal. Thirdly, that there was no consent from the relevant Land Control Board as the transaction related to a controlled area. The case of **Stanley Mbugua Gachie V. Lakeli Waithera & 2 others**, Civil Appeal No. 153 of 1996 was cited in support of this position.

Responding to these submissions, the respondent's counsel argued that Katheri Farmers Co. Ltd failed to acquire Kisima Farm and informed its members in 1986 and that that was when the cause of action arose. The respondent came to court in 1997, within the 12 years limitation. He further argued that Katheri Farmers Co. Ltd was not a party to the agreement and was similarly not responsible for the frustrated contract.

After the agreement was frustrated it was correct for the trial magistrate to find that the parties were to revert to their original positions, counsel further submitted, relying on **Chemilil Sisal Estate Ltd. V. Makongi Ltd**, (1967) EA 166. The foregoing constitute the rival arguments in this appeal. Being the first appellant court, I am bound to re-evaluate the evidence adduced in the court below in order to arrive at my own independent conclusion in the matter.

The evidence of the appellant was rather disjointed although I hasten to add that I did not have the benefit of seeing his demeanour. In one breath he says that the respondent had no land at Katheri farm while in another breath he says that the respondent had 3 acres at Katheri Farm. He admits in cross-examination that he got 3 extra acres at Katheri farm which was the respondent's land but conveniently argues that it was transferred to him by Katheri Farmers Co. Ltd. Again his testimony in chief tends to suggest that the transaction was initiated and concluded by Katheri Farmers Co. Ltd yet he explicitly admits that the agreement was between the respondent and himself. See also paragraph 3 of the defence. Indeed this latter position; that the transaction was between the parties herein is supported by the evidence of PW2, Stephen Muriira and PW3 Jeremiah Kaburia, who witnessed the transaction. The inevitable conclusion is that there was indeed an unwritten agreement between the parties to exchange land or shares. As a result the respondent surrendered to the appellant his three (3) acres of land at Katheri Farm in exchange with shares representing the equivalent at yet to be

acquired Kisima Farm.

The issues for determination are whether the transaction was a nullity due to lack of Land Control Board consent; whether the suit is time barred; whether Katheri Farmers Co. Ltd ought to have been joined in the proceedings in the court below; and finally whether the transaction was frustrated.

It is not in dispute that the alleged agreement between the appellant and respondent was oral. There is also evidence from both sides that the agreement was for the exchange of the respondent's 3 acres at Katheri Farm with the appellant's shares in Kisima Farm once acquired.

First it ought to be noted that the both the plaintiff and defence do not state when the alleged agreement was entered into. However, from the respondent's own testimony and those of his witnesses, PW2 Stephen Muriira, PW3 Jeremiah Kaburia and even the evidence of the appellant himself, it is clear that the alleged transaction was in 1979. What was the law regarding disposition of any interest in land at that time? Section 3(3) of the Law of Contract Act, before the subsequent amendments in 1990, 1996 and 2002, provided as follows:-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or willing to perform his part of a contract:-

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

The proviso does not apply to the circumstances of this appeal as the respondent had not obtained possession of the Kisima farm which was yet to be acquired. The alleged agreement being one for the disposition of an interest in land ought to have been in some form of writing and at least signed by the appellant. The only exhibits produced at the trial by the respondent were two receipts acknowledging payment of survey fees in 1990. The two, in my view do not constitute, in terms of section 3(3) of the Law of Contract Act, a memorandum or some note.

It follows, therefore, that the transaction was a nullity for failing to be compliant with the Law of Contract Act. It was argued for the appellant that the suit was time barred having been brought in 1994 while the cause of action arose in 1979. But according to counsel for the respondent, the cause of action arose in 1986 when Katheri Farmers Co. Ltd informed its members of the failure to acquire the Kisima farm.

Section 4(1) of the Limitation of Actions Act limits an action founded on contract to six (6) years. I have, however, found that there was no valid contract. The respondent's claim according to the plaint is one for the transfer of his 3 acres acquired by the appellant and amalgamated with the latter's parcel at Katheri farm to form Plot No. 1160. It is in my opinion an action to recover land in terms of section 7 of the Limitation of Actions Act must be brought within twelve (12) years from the date on which the right of action occurred

.

Having found that there was no valid contract to transfer the suit land to the appellant it follows that the cause of action occurred in 1979 when the alleged transfer took place. This suit was instituted on 7th January 1997, some fifteen (15) years after the respondent parted with his 3 acres to the appellant, clearly outside the period of limitation for recovery of land. The respondent, accordingly, was barred from instituting the suit.

The role of Katheri Farmers Co. Ltd was limited only to facilitation of the acquisition of Kisima farm. The ultimate agreement whether to exchange the land and the shares remained firmly with the parties herein. Katheri Farmers Co. Ltd cannot be held responsible for the failure to acquire Kisima farm as the same was due to the change of mind of the owner(s) of Kisima farm.

Finally, there is no dispute that the suit land is agricultural land situated within a land control area. By dint of section 6(1) (a) of the Land Control Act the parties ought to have obtained a consent from the land control board of the area. Section 6(1) (a) of the Land Control Act provides:-

“6. (1) Each of the following transactions –

(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area:

(b)

(c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any shares in private company or co-operative society which for the time being owns agricultural land situated within a land control area,

Is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act” (emphasis supplied).

There is no doubt that the requisite consent was not obtained from the relevant board. For that reason alone the transaction was void. In such a case section 7 of the Land Control Act provides that if any money or valuable consideration has been paid, the same is recoverable as a debt by the person from whom it was passed to the recipient subject to section 22 of that Act. Section 22 makes it a criminal offence for any person who receives the money or enters into or remains in possession of land the subject of a void contract. Recovery of the consideration provided for under section 7 of the Land Control Act must be done within the period limited by the statute.

For all the reasons stated in this judgment I find that the trial court fell into grave error of law and fact by awarding three (3) acres from PLOT NO. 1160 KATHERI to the respondent. The appeal is allowed and the judgment of the trial court set aside.

I award costs of this appeal and in the lower court the appellant.

Dated and delivered at Meru this 29th day of April 2008.

W. OUKO

JUDGE