REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
Civil Appeal 17 of 2005
WANGECI KIBITHE..……..…….APPELLANT

V E R S U S

BENSON KAGO……..RESPONDENT

J U D G M E N T

At the commencement of the hearing of the appeal herein, the respondent sought and was granted leave to utilize three additional authorities, which he had not incorporated into his list of authorities.

The respondent did explain that the need to rely on the extra authorities arose from the fact that he had not been served with the supplementary record of appeal which had been filed on 25th October 2006.

As will become clear later, the issue of the supplementary record of appeal was cardinal to the respondent's answer to the appeal herein.

But first, the appellant did fault the learned trial court for canceling her title to the suit property. It was the appellant's submission that the learned trial magistrate erred in that respect, because one could not cancel a title obtained lawfully, and which was a first registration.

In my considered view, it is necessary to spell out a brief history of the case between the parties herein, so as make it easier to comprehend the competing submissions made by the respective parties.

The suit was commenced by way of a plaint dated 24th May 2004. The plaintiff in the suit, is the appellant herein, whilst the respondent herein was the defendant.

The appellant's claim was premised on her assertion that she was the registered proprietor of the suit property, known as ***KITALE MUNICIPALITY/BLOCK I (LESSOS)/169.***

Notwithstanding the fact of the plaintiff being the registered owner of the suit property, the defendant was said to have erected a structure on the property. He was also accused of having refused to move out of the said property.

As if to make matters worse, the defendant is said to have started making claims that the property in issue was his, even though, as far as the plaintiff was concerned, the defendant was well aware that he had no proprietary rights to the property.

The plaintiff felt greatly inconvenienced by the defendant's continued staying on the suit property, which she intended to develop. Therefore, when the defendant failed to vacate the property, even after being given appropriate notices to do so, the plaintiff instituted proceedings in court, with a view to

obtaining orders for his eviction.

In answer to the plaint, the defendant lodged not only a Defence but also a counterclaim.

First, the defendant admitted that the plaintiff was the registered proprietor of the suit property. However, the defendant went on to assert that he had bought the said property and had been in possession thereof since 1993. By virtue of the said purchase, the defendant contended that he was a bona fide purchaser for value, and with the consent of the plaintiff.

As the defendant believed that he was the legal owner of the suit property, he decided to lodge a counterclaim against the plaintiff, seeking to have the plaintiff compelled to transfer the suit property to him.

The defendant pointed out that the Agreement for Sale, as between him and the plaintiff was dated 15th November 1993.

Having paid the agreed purchase price of KShs.80, 000/= the defendant asked the court to compel the plaintiff to transfer the suit property to him.

After a full trial, the learned trial magistrate Hon. Ms. L.M. Nafula RM delivered her judgment on 10th June 2005. It is that judgment which provoked the present appeal.

In a nutshell, the trial court had dismissed the plaintiff's claim for the eviction of the defendant. The court had then gone ahead to order the plaintiff to specifically perform that Agreement for Sale, by transferring the suit property to the defendant. The court also awarded to the defendant, the costs of the suit.

When canvassing the appeal, Mrs. Risper Arunga, Advocate for the appellant first drew the court's attention to the fact that the appellant had produced the title deed as evidence, at the trial.

Notwithstanding, the holding by the trial court, that the appellant was the registered proprietor of the suit property, the court is faulted for concluding that the appellant was nonetheless not entitled to enjoy the protection of Section 143 of the Registered Land Act.

It was the appellant's submission that by holding that it would be unjust for the appellant to have both the land and the purchase price, the trial court had failed to appreciate the effect of Section 143 of the Registered Land Act.

The appellant submitted that the respondent did concede, in his submissions before the trial court, that the appellant was the first registered proprietor of the suit property. That being the position, as viewed by the appellant, she said that no other evidence was needed, (apart from the title deed) to prove her assertion that she was the first registered proprietor.

The appellant also contended that the respondent's assertion, to the effect that he had an "overriding interest" in the suit property was as erroneous as was the finding by the trial court on that issue.

The trial court was perceived to have failed to give due consideration to the relevant law. Instead, the appellant holds the view that the trial court only sympathized with the respondent, as a party who had been wronged. Had the trial court given due consideration to the law, the appellant believes that it would have come to the conclusion that her position, as a first registered proprietor of the suit property, could not be challenged.

In any event, the appellant asserts that the Agreement of Sale dated 15/11/93 was null and void, by reason of the provisions of Section 4 (l) of the Limitation of Actions Act.

According to the appellant, if the respondent had wished to bring any action on the basis of that

Agreement for Sale, he should have done so within six years from the date when it was executed.

Therefore, the appellant faulted the trial court for having made a finding that the cause of action herein only arose after the defendant had been deprived of possession.

Furthermore, the appellant points out that the cause of action could not have arisen in the manner suggested by the trial court, because there was no evidence at all that the defendant was ever dispossessed. If anything, the fact that the plaintiff had sued for eviction was, in her view, proof enough that she acknowledged the respondent's continued occupation of the suit property.

Finally, the appellant submitted that the only recourse which might have been available to the respondent was for a refund of the purchase price. But even then, such a claim is said to have been lost because the Agreement was void.

For all those reasons, the appellant asked me to set aside the judgment of the lower court, and to substitute therewith a judgment allowing her claim, whilst dismissing the respondent's counterclaim. The appellant also sought costs both of the appeal and of the trial court.

By way of an answer to the appeal, the respondent first asked the court to strike it out altogether. The primary reason for that submission was that the appellant had introduced into her appeal, an essential document, which cannot be brought through a supplementary record of appeal.

The respondent cited two decisions of the Court of Appeal to back his contentions.

In **MZAMIL V ANSARI [1983] KLR 219**, the court had held that;

"***An essential document such as a decree cannot be brought on record by means of a supplementary record."***

In **MUNICIPAL COUNCIL OF KITALE V FEDIA A [1983] KLR 307,** at page 314, Platt Ag. JA expressed himself thus;

"***In the first application, it is clear that the record of appeal is defective in a manner which renders the appeal incompetent. In Kiboro V Posts & Telecom Corporation [1974] E.A 155 the same omission occurred. It was held that the decree could not be added to the record, not even by way of supplementary record, because a supplementary record cannot comprise documents which ought to be included in the original record of appeal, after the time prescribed has ended. All that can be done, is to apply under rule 4 of the rules of this court to extend time to file the record of appeal afresh."***

The rules being alluded to by the learned judge were the Court of Appeal Rules. In particular, the rule which requires a certified copy of the decree or order, to constitute one of the primary documents in a record of appeal is rule 85 (l) (h).

By virtue of Section (l) of The Appellate Jurisdiction Act, the rules made thereunder are for regulating the practice and procedure of the Court of Appeal, with regard to appeals and, in connection with such appeal, for regulating the practice and procedure of the High Court.

Therefore, inasmuch as the appeal before me is one from the subordinate court, to the High Court, it follows that the court of Appeal Rules would be inapplicable thereto.

As counsel for the respondent submitted, appeals to the High Court are governed by Order 41 of the Civil Procedure Rules. Pursuant to rule IA of that Order, a certified copy of the decree or order appealed against, ought to be filed either with the memorandum of appeal or as soon thereafter as possible.

In ***KENYA SEED COMPANY LTD V ANNE CHANDAI, KITALE HCCA. NO.7 OF 2000***, the Hon. Karanja J. held as follows;

*"**The decree or order appealed against must be filed and the same must be a certified copy. Failure to include a certified copy of the decree or order whether in an appeal before the High Court or the Court of Appeal renders the appeal incompetent and the same must be struck out."***

The learned judge then proceeded to strike out the appeal, as the record of appeal only contained an uncertified copy of the decree.

In the appeal before me, the original record of appeal had incorporated a copy of the decree which was not certified. I believe that it was after realizing that the said record of appeal stood the real risk of being struck out, that the appellant sought and was granted leave to file a supplementary record of appeal. The said supplementary record now incorporates a certified copy of the decree against which this appeal has been lodged.

Following the introduction of the certified copy of the decree into the record of appeal, the appellant's position was no longer comparable to that in ***KENYA SEED COMPANY LTD – V- ANNE CHANDAI*** (above-cited).

The record of the proceedings reveals that when the court did grant leave to the appellant to file the supplementary record of appeal, the respondent was able represented in court, by an advocate. The said advocate actually indicated that he was willing to indulge the appellant. I therefore find it strange that the respondent should now be taking issue with the supplementary record of appeal.

In any event, Order XLI rule IA of the Civil Procedure Rules stipulates that;

*"**where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 78B of the Act until such certified copy is filed."***

In my considered view, when the appellant filed the supplementary record of appeal, within 7 days of the order granting her leave to do so, she was complying with the provisions of rule 1A above. Accordingly, the appeal is competent and shall therefore not be struck out.

The second issue taken by the respondent was as regards the appellant's contention that hers was a first registration of the title, to the suit property.

It was the respondent's position that by producing only the title deed as evidence, the appellant failed to prove her assertion that she was the first registered proprietor.

In my consider view, the respondent has a valid point, because by virtue of Section 32 (2) of the Registered Land Act;

*"**A title deed or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register."***

Thus the title deed produced in evidence, in this matter, was only prima facie evidence of the fact that the appellant was the absolute proprietor of the suit, subject to the entries in the register and to such overriding interests set out in section 30 of the Registered Land Act as may for the time being subsist and affect the land. Those qualifications are expressly spelt out on the face of the title deed.

Nothing on that exhibit can be construed as implying that the appellant was the first registered proprietor of the suit property.

Secondly, contrary to the appellant's contention that the respondent's written submissions contained a concession that the plaintiff's was a first registration, I only traced the following categorical statement in the respondent's submissions;

"First of all, <u>there is no proof that the plaintiff is the 1st registered proprietor of this plot.</u> No evidence was provided to court however to prove this point."

In the circumstances, the appellant was not right to have intimated that the respondent had made the alleged concession.

That then leads to the question of whether or not the learned trial magistrate was wrong to have held that the appellant did not prove that hers was a first registration.

I hold the view that the trial court cannot be faulted for holding that the appellant did not adduce any evidence in support of her contention, that she was the first registered owner of the suit property.

I also note that in the Plaint, the appellant herein did not assert that she was the first registered proprietor of the suit property.

Similarly, I have found no evidence that the appellant ever stated, during her testimony before the trial court, that she was the first registered proprietor of the suit property.

But it is significant that during cross-examination, the respondent is on record as having conceded that the appellant herein was the first registered proprietor. Perhaps it was because the question regarding the first registration had not been an issue, either in the pleadings or in the evidence, upto the stage at which the respondent was cross-examined, that the learned trial magistrate observed that;

"The issue of the plaintiff being a First Registered owner of the plot has been floated by counsel for the plaintiff, however as rightly put by defence counsel in submissions, there is no evidence on record in support of this…"

To my mind, there is no reason to fault the trial court for having come to the conclusion that the issue of first registration was first raised by the advocate for the plaintiff. That is what happened, when the advocate was cross-examining the respondent. Before that moment, the appellant averments to that effect.

However, after the respondent had conceded that the appellant was the first registered proprietor of the suit property, the said concession lifted, from the appellant's shoulders, the burden of proving that she was the first registered proprietor. Therefore, although the respondent may be right to submit, as he did, that the appellant did not tender proof that she was the first registered proprietor, such proof did become superfluous as soon as the respondent conceded the point.

Had not the respondent made the concession, the fact that the appellant had adduced the title deed in evidence, would not, by itself, have been sufficient proof of her claim to first registration. In those circumstances, as the respondent submitted, the appellant would have needed to produce evidence of the history of the title in question.

The next question that must be addressed is as to whether or not a first registration can be challenged. The learned trial magistrate held that the appellant had failed to prove that she was the first registered proprietor of the suit property.

However, the trial court went on to hold that even she had proved that hers was a first registration, section 143 of the Registered Land Act only offered immunity against rectification of the register. Therefore as the respondent was not seeking rectification, but specific performance of the contract, which he said he had with the appellant, the trial court held that the appellant, who was not in possession of the suit property, could not devive benefit from that statutory provision.

According to the respondent, section 143 of the Registered Land Act only provided a first registered proprietor with protection if he/she was in possession. But the appellant contends that occupation was not a prerequisite to the enjoyment of the rights set out under that section.

In that regards, the two parties interpreted the authority of **CHAUHAN V OMAGWA [1985] KLR 656**, completely differently. Before delving into the court's understanding of that authority, I feel that it is necessary to set out herein the provisions of section 143, which reads as follows;

"(1) ***Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.***

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

To my mind, that section makes it clear that it is available as protection against rectification for those that are first registered proprietors, and who are in possession of the property. In the case of ***CHAUHAN V OMAGWA*** (above-cited) ***LAW JA*** stated as follows, at page 661;

"***The first pre-requisite of that sub-section is that rectification can not be ordered so as to affect the title of a proprietor who is in possession. The appellant was not in possession, so that sub-section (2) does not avail him."***

In like vein, the appellant herein was not in possession.

Therefore, pursuant to the words of LAW JA, section 143 (20 of the Registered Land Act cannot avail her.

Furthermore, the counter-claim by the respondent was not for the rectification of the register, but for specific performance. Therefore, when it is borne in mind that section 143 falls within part X of the Act, which deals with "Rectification and Indemnity", that is yet another reason for holding that that section was inapplicable to the matter before the court herein.

As regards the contention that the counterclaim was time- barred, by virtue of Section 4(1) of the Limitation of Actions Act, the trial court held that that was not the position in law, because, in its view, the cause of action would only arise once the respondent was dispossessed or if his possession was discontinued.

If the learned trial magistrate were right to so hold, that would imply that because the respondent has at all material times continued to remain in un-interrupted occupation of the suit property, the cause of action asserted in the counter- claim had never arisen. If that be the position, the trial court would have been obliged to dismiss the counter-claim, on the ground, that no cause of action has yet arisen.

In order to address the issue of time-bar, one must first determine what constitutes a cause of action.

In that regard, the appellant expressed the view that the cause of action accrued on the date when the parties are said to have executed the Agreement for Sale i.e. on 15/11/1993.

It is noteworthy that that contention presupposes that the parties did execute an Agreement for Sale. That therefore implies that the appellant would have moved away from her stated position, which was to the effect that she never ever executed the alleged Agreement of Sale.

She had also asserted that if there was any such agreement, it was void for lack of Land Control Board Consent. Perhaps when the appellant was making that assertion she had forgotten that in paragraph 3 of the Plaint, she had made it clear that the subject matter of the suit was a commercial plot located within the Municipality of Kitale.

The Land Control Act is an Act of Parliament to provide for controlling transactions in agricultural

land. And by virtue of section 2 of that statute;

"***agricultural land" means –***

(a) land that is not within –

(i) a municipality or a township;"

Accordingly, the suit property does not fall within the ambit of the Land Control Board.

Meanwhile, my understanding of the term " ***cause of action***"

Is that it is the event which gives rise to or triggers the right to commence legal action against another person. For example when two parties enter into a contract, but one of them breaches it, whether by omission or commission, then a cause of action is said to have accrued to that other party.

The execution of the contract would have created rights and obligations. If the parties to such a contract all honour the obligations, no cause of action would accrue.

Therefore, I hold that the appellant did not get it right when she submitted that the cause of action herein accrued on 15/11/93, when the Agreement for Sale was executed. The said cause of action only accrued from the date when the appellant took such action as could be deemed to have been in breach of her obligations to the respondent, under the Agreement for Sale.

From the testimony of the appellant, she went to make a report to the Assistant Chief in January 2004. It is then that the respondent was summoned by the said Assistant Chief of Bidii SUB-Location in Kibomet Location summoned the parties herein, to a meeting at his office.

At the conclusion of the meetings, the Assistant Chief advised that the dispute could be referred to either the Land Tribunal or to a court of law.

As the appellant's complaint was that the respondent had occupied her plot, which she wanted to have him evicted from, it is conceivable that the said complaint gave rise to the respondent's cause of action against the appellant.

In the final analysis, I find that the judgment of the learned trial magistrate was not just pegged on sympathy for the respondent, as was asserted by the appellant. The decision was founded on the validity of the Agreement for Sale, between the parties herein, as read together with the relevant law. Such law did not include any finding that the respondent had an overiding interest over those of the appellant, in respect of the suit property.

I find no legal or factual reason to justify the overturning of the judgment of the trial court. Therefore the appeal is dismissed, with costs to the respondent.

Dated and Delivered at KITALE this 18th day of June, 2007.

FRED A. OCHIENG

JUDGE