



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 83 of 2002

LUKA NJARARUHI KAMAU..... APPELLANT

VERSUS

THOMAS NGURO MUNGAI..... RESPONDENT

J U D G M E N T

On 24/2/05, the appellant, Luka Njararuhi Kamau moved to this court, by way of an appeal, challenging the judgment of the Resident Magistrate, Gatundu, in Civil Case No. 36 of 1993, on the following grounds of appeal:-

1. The learned trial magistrate erred in law and in fact, in not appreciating that the action before him was basically for recovery of land which was not yet time barred at the time the suit was filed.
2. The learned Magistrate erred in law and fact in not appreciating that the claim for a refund is find of the purchase price for the suit land was only an alternative prayer, not the main prayer.
3. The lower court erred in law and in fact in not appreciating that the issue of contract could only have been decided upon after the failure for one reason or another of the main prayer for transfer of the suit land to the Plaintiff. Accordingly it was premature for the court to have decided that the whole of the appellants claim in the lower court rested on the contract and not claim for recovery of land.
4. The learned Magistrate erred in law and in fact in not addressing himself to the issue of law submitted before him.
5. The lower court erred in not considering the submissions set forth by counsel for the appellant in the lower court.

Wherefore the appellant prays for the setting aside of the trial Magistrate's judgment.

The gist of the appeal is briefly, according to my reading of the pleadings, whether the Learned Magistrate misinterpreted the claim of the appellant, from the Plaint, as filed in the Lower Court. In other words, Was the appellant's claim one for transfer of land or refund of the sale price as per the Sale Agreement?

The importance of the above is on the difference between the limitation period in the two scenarios.

From the Plaint, dated 2/11/1993, the Plaintiff/Appellant's prayer, on this point was:

- (a) Order to the defendant to transfer her share of the Plot No. Ngenda/Gatukuyu/T.457/7 to the

Plaintiff or in the alternative a refund of K.Shs.41,500/- (the purchase price) plus damages for breach of contract.

At the lower court, the Respondent/Defendant's defence was that there was no such contract as claimed by the Plaintiff/Appellant, and even if there was, the claim was time barred under the Limitation of Actions Act.

I begin by stressing that the suit was dismissed by the Learned Magistrate on a Preliminary Objection by the Respondent/Defendant, that the suit was time barred. The present appeal arose from that holding that the suit was statute barred.

I have carefully considered the submissions of both sides; the grounds of appeal, and the entire Record of appeal.

The appellant's case is that the suit – the main prayer is for recovery of land and the limitation period is 12 years, as set out in Section 7 of the Limitations of actions Act, Cap. 22, Laws of Kenya, not six years, as stipulated for causes of action arising from contracts, as per Section 4 of the same Cap. 22.

The appellant's position is that the lower court misdirected itself in not appreciating that there were two prayers – the main one being for recovery of land, and in the alternative refund of the purchase price, plus damages for breach of the agreement for sale.

There seems to be an unnecessary misconception on the part of the appellant with respect to the prayers in the Plaint. From the plaint, there really is only one prayer, not two. That prayer is for the transfer of the suit property, failing which the Respondent to refund the price money paid, plus damages for the breach of the agreement for the sale of the property. If that be the case, as I hold it is, there is a clear inconsistency between the claim in the plaint and the grounds of appeal for recovery of land.

Simple logic would suggest, at least to me, that one can only recover that which is his or has at one point in time been his, but was illegally or unlawfully taken away – possessed or occupied by another person. To pray for transfer of the suit plot by the appellant clearly means that the title to the property has not been transferred to him. And if the property has yet to be transferred to him, as per the Agreement of Sale, how can the term recovery be invoked? Recovery of what and from whom if the property had at all times been in the Respondent's ownership? For the prayer to make sense, as submitted by Counsel for appellant, and for the prayer to come into the context and meaning of Section 7 of the Limitation of Actions Act, Cap. 22, the Sale Agreement must have been completed; the property transferred to the appellant, and somehow, the Respondent illegally or unlawfully taken possession or re-acquired the title to the said property.

That is not the position here. The prayer for the transfer of the suit plot clearly means that the Respondent had not performed his part of the Sale Agreement – transfer the plot to the purchaser/appellant. Those obligations are no doubt contractual and the limitation period is well spelt out under Section 4 of the Limitation of Actions Act. That is within six years from the time of the breach – when seller/Respondent failed to transfer the property to the purchaser/appellant.

The invocation of the provisions of Section 7 of the Limitation of Actions Act, is totally misconceived. That Section deals with adverse possession and is totally inapplicable where as in this case, the person invoking it has never owned nor possessed or occupied the disputed land. How then can there be adverse possession which is the starting point for the 12 years referred to therein?

All in all, and for the above reasons, I uphold the judgment by the lower court, that the suit was founded on the Sale Agreement, a contract which was time barred at the time it was filed.

Accordingly, I dismiss the appeal with costs in favour of the Respondent and against the appellant.

DATED and delivered in Nairobi, this 24th day of May, 2006.

O.K. MUTUNGI

JUDGE