



IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 64 of 2003

ECHFAN MWARIRI KAMAU.....APPELLANT

VERSUS

JAMES TOBIAS OKONJO.....1ST RESPONDENT

JOSEPH ODINGO AGOLA.....2ND RESPONDENT

KENYA COMMERCIAL BANK LTD.....3RD RESPONDENT

JUDGMENT

The appeal herein arose from the trial court's ruling in **CMCC No. 246 of 2003** wherein the court upheld a preliminary objection that was raised by counsel for the second respondent after the appellant had argued his application seeking some injunctive orders. But before I consider the said ruling and the grounds that were advanced by the applicant, I think it is only fair that I give a brief background of the facts and pleadings that were raised before the trial court.

The appellant stated that sometimes in July, 1986, he bought 5 acres of land parcel number **RONGAI/LENGENET BLOCK 2/12** from the first respondent herein. The entire parcel of land comprised in the aforesaid title measured 33 acres or thereabout.

The first respondent was one of the administrators of the estate of Michael Okonjo who was the registered owner of 100 shares in Mawe Farm Limited which owned parcel of land number **10024** in Rongai. Parcel number **Rongai/Lengenet Block 2/12** was a subdivision of the aforesaid land parcel number **10024**.

On 23rd October, 1986 the administrators of the estate of Michael Okonjo, the first respondent and Christabel Okonjo entered into an agreement with the second respondent whereby the administrators sold the aforesaid 100 shares in Mawe Farm Ltd to the second respondent.

As per the said agreement the vendors were to surrender the share certificate to the purchaser upon payment of Kshs.5000/- and thereafter the purchaser's name was entered in the register of Mawe Farm Limited. The agreement further provided that upon transfer of the shares to the purchaser, the vendors would have no further claims on any right, benefits, or profits attaching to Plot No. 10024. It is not clear whether at the time when the vendors were entering into the aforesaid agreement with the second respondent they informed him that they had sold 5 acres of the land to the appellant. The records show that the second respondent paid to the administrators of Michael Okonjo Kshs.305,000/- or thereabout and thereafter he obtained a title deed for the entire parcel of land, **Rongai/Lengenet Block 2/12**. The first respondent stated during the hearing of the appeal that the second respondent paid to them money equivalent to 23.5 acres only and he was surprised to learn that he had obtained a title for the entire parcel

of land. However, the agreement of 23rd October, 1986 showed that the first respondent and his co-administrator had surrendered all their interests in Mawe Farm Ltd to the second respondent and it would appear that the second respondent got the title to the suit land directly from the said company.

The second respondent charged his property to the third respondent to secure a loan from the bank. He was unable to repay the loan and the bank exercised its statutory power of sale and sold the property by public auction on 15th October, 2002. Earlier in 2001, the appellant had filed a suit, CMCC No. 1624 of 2001 against the second and the third respondents seeking to restrain them from disposing of the said parcel of land but the case was dismissed on 29th November, 2001. No appeal was filed by the appellant against the said dismissal.

By the time when the suit that gave rise to this appeal was being filed in February 2003, the property in question had already been sold and transferred to an innocent purchaser for value who is not even a party to the proceedings. When the appellant's application seeking to restrain the respondents from selling or transferring the suit premises came up for hearing, counsel for the second respondent raised two preliminary objections. He argued that the suit was time barred, the second respondent having purchased the property in dispute in 1986, over 12 years prior thereto and he based that argument on the provisions of **Section 7** of the **Limitation of Actions Act Cap 22 Laws of Kenya**. He also argued that no injunction could issue as against the second respondent, since the sale and transfer of the property had already been completed.

For the third respondent, it was submitted that the bank had lawfully sold and transferred the suit premises. The trial court upheld the preliminary objections and said that the application was incompetent and without merit and proceeded to dismiss the same with costs. From the summary of events which I have highlighted above, the trial magistrate cannot be faulted for having dismissed the appellant's application and upholding the said preliminary objections. It is clear that the appellant's claim was time barred, having been filed outside the stipulated 12 years period as per **Section 7** of the **Limitation of Actions Act** without leave of the court.

Secondly, the suit premises having been lawfully disposed of by the third respondent prior to the hearing date, the application was doomed to fail. The court was also informed that the appellant had already been evicted from the suit land.

The appellant's claim, if any, cannot lie as against the second and the third respondents. I see no merits in the appeal and I dismiss the same with costs to the third respondent. The second respondent was not represented during the hearing of the appeal.

DATED, SIGNED AND DELIVERED at Nakuru this 30th day of September, 2005.

D. MUSINGA

JUDGE

30/9/2005

30/9/2005

Before D. Musinga J.

Makana - Court Clerk

Appellant present in person 2nd respondent absent

N/A for the 3rd respondent

COURT:

Judgment delivered in open court.

D. MUSINGA

JUDGE

30/9/2005