REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 135 OF 1997

LEAH NYOKABI …….APPLICANT

VERSUS

KIARIE WAHOTHI ‘B’ ……..RESPONDENT

J U D G M E N T

The appeal is against the judgment of the Acting Resident Magistrate (W.N. Nyarima) delivered on 21st July 1993 at Nairobi.

In the lower court the respondent herein had sued the appellant and sought an order for the transfer of parcel of land No. Ndarugu/Gakoe/84 by the appellant to him plus costs of the suit and such further or other relief as the court may deem fit.

A defence filed to the suit stated that the appellant had purchased the suit land from the respondent in 1965 at a consideration of Kshs.3000/= and that after such purchase she had taken possession of the suit land and effected extensive developments thereon.

The appellant also stated in the defence that the suit was time barred under the provisions of the Limitation of Actions Act.

When the case was fixed for hearing on 20th January 1993, the appellant raised a preliminary objection which the court heard and dismissed. The suit proceeded to hearing on 12th May 1993 and 23rd June 1993. Judgment was delivered on 21st July 1993 wherein the order for transfer of the land was refused while an order for the appellant to pay to the respondent a sum of Kshs.5,000/= for trees and wattle trees with interest thereon to be calculated from the date of sale was made. The respondent was to meet the costs of the suit.

An appeal was lodged against the decision of that court on 27th May 1997, after of course, leave was granted to lodge it out of time.

The memorandum of appeal listed 4 grounds of appeal, namely that the learned magistrate erred in dismissing the appellant’s preliminary objection based on the limitation of Actions Act; that he erred in admitting oral evidence to contradict documentary evidence, that he erred in finding that the appellant owed the respondents money in face of unchallenged evidence proving payment and that he erred in awarding costs to the respondent when he had dismissed his claim.

The appeal was fixed for hearing on 5th February 2003 wherein counsel for the parties appeared either to present or oppose the same.

Counsel for the appellant submitted that it was wrong for the magistrate to base his decision to dismiss the claim on fraud other than on the limitation period as the appellant had produced all documents to prove ownership of the suit land.

That it was wrong for the learned magistrate to order the appellant to pay the balance of the purchase price for trees and fixtures when these were paid for as part of land. She prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and stated that since no appeal had been lodged against the dismissal of the preliminary objection – it being a preliminary decree, ground 1 of the grounds of appeal cannot stand.

That the court was entitled to take into account both oral and documentary evidence in deciding the case before it.

Counsel argued that since the appellant had agreed before the sub-chief to pay to the respondent Kshs.120/= or other money amounting in total to Kshs.5,000/= for fixtures, the court was justified in ordering the appellant to pay this money to the respondent which covered an order for

"any further relief as the court may deem fit".

That the court was right in awarding costs to the respondent as this was at the discretion of the court. He prayed for the dismissal of the appeal.

As regards the appeal against the magistrate's ruling on the preliminary objection, I see no purpose for it.

This was a decision on its own. It was made on 10th February 1993 and was appealable, I think, with leave of the lower court.

No such leave was sought, hence no appeal was lodged. Time for such appeal lapsed and the appellant is caught by the Limitation of Actions Act to urge the point on the appeal against the magistrates decision on the main case.

I do not understand the appellants arguments on ground 2. The important thing in the case subject to this appeal was that the respondent's main prayer in the suit for transfer of the suit plot No. Ndarugu/Gakoe/84 from the appellant to the respondent was refused.

Whether wrong evidence or reason was used to arrive at this decision was neither here nor there as such reason would only have mattered if the respondent filed a counter cross appeal. As to the magistrate's order for the appellant to pay to the respondent Kshs.5000/= for trees and other fixtures. I think such an order had no basis.

The evidence of the respondent did not say he wanted the appellant to pay him any money for trees or other textures. He wanted the appellant to be evicted from the suit land for failure to pay Kshs.4,000/= said to be outstanding.

But he offered no evidence to lay the basis for a claim of that money. No oral or documentary evidence was adduced by him to show Kshs.4000/= was outstanding.

In fact during cross-examination the respondent stated that he had forgiven the appellant about the purchase price and was only claiming the land back.

Having said so and lost the land in the magistrate's judgment, there were more evidence than what he offered required from him to entitle him to a refund of the purchase price, subject of course to the Limitation of Actions Act.

The question of a running account in this matter did not arise or was not reflected in the lower court evidence. This appeal, which, I think, was against the order for the payment of the balance of the purchase price is meritorious. No evidence was adduced to prove such balance on a balance of probabilities.

I allow this appeal and declare that the appellant owes no money to the respondent and that she can pay none to him.

There will be no order for costs of this appeal.

Delivered this 20th February, 2003.

D.K.S. AGANYANYA

JUDGE