



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 3 OF 1996

PETER MUNI KAMIRU APPELLANT

VERSUS

SAMUEL NJIRE KIHENJA RESPONDENT

JUDGMENT

The Appellant has appealed against the judgment of the Resident Magistrate, Mrs. A. M. Macharia, in the Senior Resident Magistrate's court at Murang'a in Civil Case No. 351 of 1994 where in the learned Resident magistrate ordered that the Appellant do give immediate vacant possession of the suit parcel of land No. LOC. 10/KANYENYAINI/T.32 to the Respondent plus costs.

Both parties were purchasers of the suit parcel of land from the owner a person they refer to as a petitioner. He has since died. The Appellant was the first purchaser and said in his evidence that he bought the land in 1971. The Respondent was the second purchaser and said in his evidence that he bought the land after the Appellant had breached the contract the Appellant entered into with the Petitioner.

It is my feeling that evidence was not comprehensively given in this case. A lady who gave evidence in support of the Respondent said that the deceased was her husband and that the Respondent's money assisted them in educating their children.

Both parties knew who the seller was in the succession cause and the Respondent pointed out that he obtained the disputed land through succession cause No. 249 of 1993. During the trial the Respondent had obtained title to the suit parcel of land. That was why he was suing for vacant possession.

It has not been said why the Appellant did not go to the succession cause, like the Respondent did, to press for his interest in the suit land. The Respondent went to the succession cause to claim his interest. The court accepted it and the Respondent got the suit parcel of land.

That land having been given by the court to the Respondent, the Appellant who claimed a similar interest in the suit parcel of land but had failed to go and press for it in the succession cause lost that interest to the Respondent. At the same time the petitioner having given that interest to the Respondent through the succession cause the petitioner remained with no more interest in that land to give to the Appellant.

Parties had consented before Justice Sheikh Amin that this court decides this appeal on the basis of written submissions only. I have read respective written submissions by M/s Wairagu & Wairagu Advocates for the Appellant formerly Defendant and M/s J.N. Mbuthia & Co Advocates for the Respondent formerly Plaintiff.

There is no dispute that the seller of the suit piece of land did not go far with the Appellant because the Appellant failed to complete payment of the agreed purchase price. He had been given possession and evidence is that he even buried his wife and his father on that land. In this appeal the Appellant claims to have constructed a permanent house on the suit piece of land although in his evidence before the trial magistrate that was not said.

The way this case is presented it sometimes comes out as if the person who sold the land did so as a petitioner in the estate of another person. But sometimes again it comes out as if the seller had died after entering into the two separate sale agreements and it was a petitioner in the seller's estate who, through the succession in which he was the petitioner accepted the Respondent's claim and transferred the suit parcel of land to the Respondent. It is in this second situation that one would understand properly what the parties mean when they say that the Appellant bought the land in 1971 and the Respondent bought the same piece of land in 1984. A certified copy of the relevant land register shows that the Respondent was registered as proprietor of the suit parcel of land following the aforementioned succession proceedings on 16th May 1994.

If that is the case, what was the Appellant doing to acquire title? I have not been told when the seller died. The Appellant claims that having lived on that land all that time the land belonged to him and that it was not therefore in the estate of the seller during the succession proceedings through which the Respondent obtained title.

On my part, I say that if that were so, that was a good and appropriate ground for the Appellant to have raised in the said succession proceedings. He seems to be claiming adverse possession against a person who had died. In a situation like that one the court does not give title to the claimant who has never gone to the court to make that claim. The claimant has to go to court to obtain a declaration.

The Appellant had been allowed by the seller to take possession of the suit parcel of land following an agreement for sale of the land which was subject to provisions of the Land Control Act. There is no evidence consent was obtained. If no consent was obtained, from the appropriate Land Control Board, the sale agreement became void and the Appellant was entitled to refund of purchase price, it being a criminal offence to proceed with a void transaction.

If the transaction became void, duty was upon the Appellant to establish in court when adverse possession started to run against the seller who had consented to the Appellants possession of the suit parcel of land. If the Appellant failed to do that while the seller was alive, the Appellant should have tried to do so in the succession proceedings through which the Respondent obtained title.

There is no dispute that the Appellant did not go to court to claim adverse possession against the seller and that he never went to the subsequent succession proceedings. When served with pleadings in this suit, the Appellant, who somehow claimed that he had filed an application in the High Court challenging the succession proceedings through which the Respondent had obtained title, never filed a formal application before the trial magistrate in this suit to stay proceedings in the magistrate's court and never therefore produced evidence before the trial magistrate to show that he was indeed challenging the succession proceedings. Yet he says he expected the trial magistrate to stay the proceedings before her and blames her for having proceeded with the hearing. I cannot accept that blame as I find it to have no lawful basis. If there was a genuine challenge, why is it pending to date?

Moreover, before the learned trial magistrate in Murang'a court, the Appellant never raised a counter claim in respect of the interest he claims in the suit parcel of land. How then can this court assist the Appellant acquire his claimed interest when he fails to file relevant cases in court?

Furthermore if the Appellant intended to file suit based on a contract of sale, then to date there can be no doubt that the suit is time barred by provisions of the Limitation of Actions Act.

Otherwise for the Appellant to allege that his evidence was not given much weight by the trial magistrate is to fail to be objective. I have read the learned magistrate's judgment. It is short but clear that

the magistrate properly considered evidence on both sides. Evidence is set out and considered for a final decision based on reasons given. This ground cannot therefore succeed.

From what I have been saying above therefore, the Appellant is not entitled to the relief sought.

Accordingly, this appeal be and is hereby dismissed with costs to the Respondent.

Dated this 19th Day of May 2003.

J.M. KHAMONI

JUDGE