



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 501 OF 1999

JESSE WANJAH KIROGOIAPPELLANT

VERSUS

JULIUS KAMAU MBUGUARESPONDENT

J U D G M E N T

During the year 1984 (6th December) the appellant and the respondent entered into an agreement wherein the former agreed to sell to the latter 3 acres out of his land otherwise known as plot number 210 Mawingo for Kshs.30,000/=.

It would appear on the date of the agreement (exhibit 1) the respondent took over possession of the 3 acre portion after paying Kshs.20,000/=.

But either because the appellant repudiated the agreement or the respondent did not pay the balance of the purchase price a disagreement erupted between the two parties and the appellant did not sub-divide the land to give to the respondent his portion.

This is why a suit was filed in court on 13th February, 1998 as amended on 25th June 1998 to pray for specific performance of the contract or in the alternative for a refund of Kshs.30,000/=.

A defence and counterclaim filed to the claim on 5th June 1998 denied the said claim and prayed for the dismissal of the suit for the respondent to be evicted from the suit plot and costs of the suit and the counter claim.

The cause was heard on 9/2/99 by J.G. Ombiro, Resident Magistrate based at the Principal Magistrates Court, Nyahururu.

The Respondent testified on the basis of his pleadings and said after the agreement, the parties signed transfer documents and went to the Divisional Land Control Board.

That again on 24th April 1995 the parties entered into another agreement, this time, for the sale of some trees on the land for Kshs.3,500/=. That they went to the Land Board on 26th April, 1995 and received consent on the same day.

That after the appellant signed the documents, he went to Kibwezi then he started dodging telling the respondent he had no land and this is why he filed the suit subject to this appeal.

During cross-examination the respondent stated that by the time of the agreement to buy the land, the same belonged to the Settlement Fund Trustees.

The appellant also testified and stated that after the parties had entered into the agreement and the respondent paid to him Kshs.20,000/= he disappeared. He stated that the parties had not gone to the Land Board over this transaction but he only realized later that there was a consent in the Board file.

He prayed that the suit be dismissed and the respondent ordered to vacate the suit land. The learned Resident Magistrate wrote his judgment delivered on 13th April, 1999 and ordered the appellant to transfer the 3 acres of land to the respondent and dismissed the counter claim, with each party bearing his own costs – hence the present appeal through a memorandum of appeal dated 16th November, 1999.

Counsel for the parties appeared in court on 19th June 2002 and either presented or opposed the appeal with the appellants counsel stating that for an agreement entered into in 1984, the consent obtained for this transaction in 1995 was not valid as it should have been obtained within 6 months of the making of the agreement.

That there were contradictions in respect to the year the agreement was made and the number of the land in dispute. And that if the appellant became the registered proprietor of the land on 30th June 1997, then the subject matter of the sale agreement did not exist in 1984.

He prayed that the appeal be allowed with costs. Counsel for the respondent opposed the appeal and referred to the agreement of 25th April, 1995 which related to the same land and for which consent was obtained.

According to the counsel parties would not have gone to the board when the respondent had not paid the full purchase price. He prayed for the appeal to be allowed. I have heard and recorded the submissions of counsel for the parties.

The agreement subject to the suit herein was dated 6th December, 1984 and the consent of the Land Control Board is dated 26th April, 1985.

Whether or not that consent was based on the original or amended plaint, that time was covered within the 6 months period within which an application for consent should be made to the Land Control Board of the Land Control Area – see Section 8 of the Land Control Act.

The only problem which arose was whether or not the appellant did sign or not, the application forms for such consent, but nobody picked up to confirm the authenticity of this denial.

However, whether the claim was based on the original or amended defence, the respondent was bound by those pleadings dated either 6/12/84 or 25/4/85 and when he talked of the agreement of 24/4/1995 in his evidence, this was bound to be ignored by the magistrate who should have based his judgment in the years on the pleadings to find that the consent of the Land Control Board was obtained properly.

In any event the agreement of 25th April, 1985 related to the sale of 98 trees and had nothing included therein about plot number Maringo/210.

But if the agreement on which the respondent was based is dated 6/12/84, as it no doubt was the suit instituted for recovery of the portion of plot Number Maringo/210 was filed in court on 13th February, 1998 – a period of 14 years after that agreement.

Under Section 7 of Limitation of Actions Act, such suit should have been filed in court within 12 years from the date of the agreement.

It would appear that the suit subject to this appeal was barred by the Limitation period and that this point must have escaped the magistrate's mind to rule in favour of the respondent.

On the other hand, though the amended plaint sought refund of the purchase price, he made no such plea when he testified.

Even if he had, he might also have been caught by Section 6 of the Limitation of Actions Act which limits claims under contract to 6 years.

Then Law here is certainly unfair to the respondent but there is nothing this court can do about it.

I allow this appeal and set aside the lower court order and give the respondent 12 months from this date to arrange how to vacate the appellant's land; not of course, without condemning the latter for this inhuman act.

Delivered this 15th day of July, 2002.

D.K.S. AGANYANYA

JUDGE