



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

civ suit 2587 of 94

LUCKY SUMMER ESTATE CO. LIMITED & 3 OTHERSPLAINTIFFS

VERSUS

KARIUKI & GATHECHA RESOURCES LIMITEDDEFENDANT

R U L I N G

This suit started way back in 1994. There were four plaintiffs and the original plaint had to be amended from time to time since there was confusion as regards the correct names of the plaintiffs. The last amended plaint gave the names of the plaintiffs as follows:-

1. Lucky Summer Estates Limited
2. Gitathuro Kariobangi Company Limited
3. Huruma Kuga Na Gwika Limited
4. Ngunyumu Housing Company Limited.

The defendant has always been Kariuki & Gathecha Resources Limited. There were numerous applications which contributed to the long delay in determining the matters in dispute. The formal hearing of evidence finally commenced on 7th May, 1996. After hearing the evidence of two witnesses who gave evidence on behalf of 1st and 3rd Plaintiffs, Mr. Nabutete issued a notice of preliminary objection. This objection was based on the fact that having heard the evidence of the two witnesses and having regard to the documents produced it has now transpired that the plaintiffs' suit ought to be dismissed as the land in dispute was agricultural land and hence the provisions of Land Control Act (Cap.302) not having been complied with any transaction was null and void. Mr. Gathenji for the plaintiffs contended that

preliminary objection could only be based on admitted facts. Mr. Amollo for the defendant pointed out that where facts and law are admitted a determination should be made and in his view, preliminary objection can be raised at any stage of the proceedings. In this suit, the plaint was amended thrice so that by the time the preliminary objection was raised the court had before it what we can call the third version of the original plaint. The court can look at the pleadings and consider the evidence of the two witnesses who have already testified and if all these would show that the facts and the law are not in dispute then a

determination may be made. We now know that the dispute relates to a piece of land within Nairobi City known as L.R. No. 31 Ruaraka/Nairobi. It has come out of the evidence of the plaintiffs' two witnesses that this was agricultural land. It has also come out clearly that the four plaintiffs are public companies within the meaning of the Companies Act (Cap.486 Laws of Kenya). The amended plaint gives the dates of the agreements signed between the plaintiffs and the defendant. It has been stated that the defendant has failed to do certain things which have led to this suit being filed. For example, the defendant has failed to surrender to the Registrar of Lands the main title to the suit land so as to enable the registrar of Lands to process separate titles for the plaintiffs. The defendant has failed to surrender the public facilities to the City Council of Nairobi and has also failed to procure all the required clearances and certificates from the relevant authorities. The issue raised by preliminary objection is the effect of Limitation of Actions Act and Land Control Act on the respective agreements between each plaintiff and the defendant. Section 4(1) of the Limitation of Actions Act (Cap.22 Laws of Kenya) provides:-

"The following actions may not be brought after the end of six years from the date on which the cause of action accrued -

(a) actions founded on contract

(b) actions to enforce a recognizance;

(c) actions to enforce an award

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

(e) actions including actions claiming equitable relief for which no other period of limitation is provided by this Act or by any other written law. In the present suit, each plaintiff has based its action on contract. There is however, an alternative claim based on adverse possession but we shall deal with the issue of adverse possession later.

The claim by 1st plaintiff is based on two agreements of sale dated 23rd March, 1979 and 28th March, 1983. Taking the second agreement as the final contract the six years period expired in 1989, while the suit was filed in court in 1994. Clearly, the action was out of time.

As regards the 2nd plaintiff its claim is based on two agreements of sale dated 26th March, 1979 and 18th December, 1979. The six years period must have expired in or about 1985 - and yet the suit was filed in 1994, which was out of time. The 3rd plaintiff's claim is based on sale agreement dated 18th August, 1981 and 14th September, 1981. When the suit was filed in 1994 the 3rd plaintiff was out of time. The 4th plaintiff based its claim on oral agreement which fortunately was reduced into writing on 8th March, 1978.

Unfortunately, the plaintiffs did not state when the defendant breached the various contracts entered into by the parties. It was difficult to state with any certainty as to when the cause of action accrued. The plaintiffs were not clear on this issue and this gave liberty to the defendant to raise its objection based on Limitation of Actions Act. What can be said about the sale agreements is that they were all entered into prior to 1983 while the suit was filed in 1994. In *Divecon Limited v. Shirinkhanu Sadrudin Samani* - Civil Appeal No. 142 of 1997 (unreported) this Court stated:- "To us, the meaning of the wording of section 4(1) that: "The following actions may not be brought after the end of six years from the date on which the cause of action accrued -

(a) actions founded on contract" is clear beyond doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued an action founded in contract.

The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely an action that is brought in contract six years after the cause of action arose or any application to

extend such time for the bringing of the action. The provisions of section 3 of the Act also support the view we have just expressed as to the meaning to be ascribed to section 4(1) of the Act".

In view of the above, the preliminary objection based on Limitation of Actions Act is justified. There were several agreements entered into by each plaintiff and the defendant. If there was any breach by the defendant, it must have been soon after the agreements were entered into. But the plaintiffs waited until after about ten years or more before filing suit. Clearly, each of the plaintiffs was out of time and hence this suit cannot be maintained against the defendant in view of clear provisions of Section 4(1) of the Limitation of Actions Act (Cap.22 Laws of Kenya).

The other limb of preliminary objection was based on Land Control Act (Cap.302 Laws of Kenya). The facts of this case which are not in dispute are that this land in dispute was agricultural land. The parties went as far as making application for consent under Land Control Act but it was alleged that there was an attempt to disrupt the Land Control Board meeting. We have also noted that there were applications for change of user. All these attempts did not bear any fruit by the time this suit was filed. Hence by the time this suit was instituted, the land in dispute was agricultural land, which meant any sale transfer or lease in respect of this land fell under the provisions of section 6(1) of the Land Control Act (Cap.302 Laws of Kenya) which provides:-

"6(1) Each of the following transactions - (a)the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area.

(b) (c) is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act".

The law is clear. Without consent from the relevant Land Control Board any sale, transfer, lease, mortgage or partition of agricultural land would be null and void for all purposes.

There are numerous authorities on this point but the best illustration would be found in the decision of the Court of Appeal in a suit involving this same land known as L.R. No.31 Ruaraka Nairobi and in which one of the parties was the defendant herein. That is the case of Nyakinyua and Kangei Farmers Company Limited vs. Kariuki & Gathecha Resources Limited - Civil Appeal No. 16 of 1979 in which in his judgment Kneller Ag. JA (as he was then) stated:- "L.R No.31 Ruaraka, Nairobi is 'agricultural land' within an area to which the Minister applied the Land Control Act (Cap.302) and its sale would be a 'controlled transaction; section 2, 6(1) and (3) (ibid).

The learned Judge in my view, was right to hold that the agreement of October, 1974 to dispose of this land by sale was void and for all purposes because neither party applied for consent in respect of this transaction in the prescribed form to the land control board within six months of the making of the agreement (s.8 (ibid).

Then Kneller Ag. J.A went on to state:- "More importantly because this is fundamental, the appellant is a public company, so the board cannot consent to the disposal of this agricultural land by sale to it (S.9 (1) (c). The board purported to do so on August 15 1974 but that decision was a nullity because it was made without jurisdiction".

And in the leading judgment of the Court in that case Potter J.A said:- "The appellant is a public company registered under the Companies Act (Cap.486) and is said to have 2,000 shareholders. The respondent is a private company registered under the Companies Act.

The subject matter of the dispute between the parties is a plot of land of some 181.31 hectares, described as LR No.31 Ruaraka, Nairobi. There is no dispute that the suit land is "agricultural land" within the meaning of the Land Control Act (Cap.302) hereinafter referred to as "the Act"). And in his judgment Law J.A. said:-

"The background to this appeal is fully set out in the judgment prepared by Potter J.A which I have had

the advantage of reading in draft. I agree with his conclusion that the Land Control Board had no jurisdiction to give its consent to the controlled transaction, the subject of this appeal, which was the sale by a private company (the respondent) of land within a land control area to a public company (the respondent). This is clear from a perusal of section 9 of the Land Control Act".

It is interesting to note that disputes relating this particular piece of land known as L.R. 31 Ruaraka, Nairobi have been going on for sometime now. In the present case, the preliminary objection rested on the fact that the plaintiffs' claim cannot be granted as they did not obtain consent of the relevant Land Control Board for the sale transaction. In the case cited above (Civil Appeal No.16 of 1979) it was held that even the consent by the Land Control Board was not valid since one of the parties was a public company. In the present case all the four plaintiffs are, by their own admission in the amended plaint and by evidence of the two witnesses who have already testified, public companies registered under the Companies Act (Cap.486). By virtue of the provisions of section 6(1) of the Land Control Act (Cap.302) the agreements to dispose of this land in dispute by sale was null and void for all purposes.

But the plaintiffs were not completely helpless since the same Land Control Act gives them an opportunity to seek exemptions from these very rigid requirements. Their salvation lies in section 24 of the Land Control Act (Cap.302) which provides:-

"24. The President may, by notice in the Gazette exempt- (a)any land or share or any class of land or share or (b)any controlled transaction or any class of controlled transaction; or (c)any person in respect of controlled transactions or some class of controlled transaction, from all or any of the provision of this Act or from any prohibition made under section 23 or such conditions (if any) as he may think fit to impose".

Mr. Gathenji for the plaintiffs appears to have conceded that under the provisions of the Land Control Act (Cap.302) the agreements to dispose of this land in dispute by sale was null and void. But Mr. Gathenji went further to show that the transactions in question were exempted by the President. I have been shown a special issue of Kenya Gazette Supplement No.39 of 24th July, 1998 in which the Legal Notice No. 92 shows that four transactions in which the four plaintiffs are involved were exempted from Land Control Act. The Gazette notice refers to the following:-

1.L.R Nos. Nairobi/Block 31/4 and Nairobi/Block 31/24 comprising 120 acres situated in Ruaraka Nairobi. 2.L.R No. Nairobi/Block 31/33 comprising 58 acres situated in Ruaraka Nairobi. 3.L.R No. Nairobi/Block 31/2 and Nairobi/Block 31/26 comprising 19 acres situated in Ruaraka, Nairobi.

4.L.R No. Nairobi/Block 31/32 comprising 20 acres situated in Ruaraka, Nairobi. It was the plaintiffs contention that in view of the above exemption, they are entitled to the reliefs sought. They sought to show that exemption can operate retrospectively. The objection by the respondent was based on the Limitation of Actions Act (Cap.22) and Land Control Act (Cap.302). The plaintiffs relied on the decision in John Wilfred Spiers and Another V. Njokerio Farmers Company Limited - Civil Appeal No.35 of 1982.

Having considered the facts as admitted it is now clear that the land in dispute was agricultural land and hence the sale transactions fell within section 6(1) of the Land Control Act (Cap.302). At the time the suit was instituted in 1994, there was no consent from the relevant Land Control Board nor exemption granted by the President under section 24 of the Land Control Act. Hence the defendant's objection to the effect that the relief sought could not be granted by the court was well founded.

What can be said about this dispute is that the plaintiffs became rather impatient. This was a sale transaction involving four public companies on one hand and a private company on the other. The land in dispute was agricultural land. There were a number of applications to be made to the relevant authorities like the Nairobi City Council. The process was slow but absolutely necessary. It has not been shown that the defendant company had become difficult. It would appear that since the plaintiffs are public companies with a large number of shareholders they were under pressure to conclude the transactions so that each shareholder may be sure of his/her title. We now know that the shareholders have already moved on the land in dispute and carried out extensive developments. It is the sheer thought of losing all

these developments that forced the plaintiff companies to come to court in a bid to achieve quick solution to an imminent problem.

But if the plaintiffs and their legal advisers had been aware of the Court of Appeal decision in Nyakinyua and Kangei Farmers Company Limited vs. Kariuki & Gathecha Resources Limited (Supra) they would have been slow in rushing to court.

As I have attempted to demonstrate the plaintiffs' suit fails by virtue of Limitation of Actions Act (Cap.22) and Land Control Act (Cap.302). But that does not mean the plaintiffs are without remedy. They put in an alternative claim based on adverse possession. But this suit was brought by way of plaint. A suit for adverse possession should be brought by way of originating summons. Order IV Rule 1 of the Civil Procedure Rules provides that:-

"Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed".

That means the usual way of starting suits is by way of a plaint but there are also other ways which can be prescribed for starting suits.

Order XXXVI Rule 3D of the Civil Procedure Rules prescribes the manner for starting a suit for adverse possession under section 38 of the Limitation of Actions Act (Cap.22 Laws of Kenya). Such a claim is to be started by way of an originating summons supported by an affidavit and a copy of the title to the land adversely claimed has to be annexed to the affidavit. Order XXXVI Rule 3D (1) is mandatory in that it is to the effect that: "..... shall be made by originating summons".

Various decisions of the Court of Appeal among them Bwana v. Said (1991) 2 KAR 262 specifically lays it down that a claim for adverse possession must be started by an originating summons. Hence as matters stand now a claim based on adverse possession cannot be entertained in this suit which has been brought by way of a plaint and not originating summons.

What then can be said about this suit? According to the pleadings in the file it would appear that there was some haste in bringing this matter to court. For example when the plaint was filed it was later found that amendments to the plaint were necessary. Indeed the plaint was amended three times. Even the correct names of the plaintiffs had not been stated. While the suit was pending in court the parties proceeded with further transactions in a bid to complete the sale transactions. From what is before me, I am satisfied that the plaintiffs and the defendant entered into various agreements with a clear intention of settling the shareholders in the four public companies on their respective portions of land. As of now these shareholders have developed their respective plots on which they either live or carry on commercial undertakings. The shareholders did not wait for the completion of the sale transactions. The defendant on the other hand did not stop the shareholders from taking possession. Hence this dispute must have come as a surprise to most of the shareholders.

The defendant is to blame for having allowed the shareholders to settle before completion of the sale transaction. But from the pleadings it has not been indicated that the defendant was in breach. I have carefully considered the amended plaint but there is no clear reference to any breach by the defendant. All I can see is that the process of getting various clearances certificates consents etc. were rather too slow. This is where the plaintiffs blame the defendant company otherwise I see no serious dispute in this matter. In their haste to assert their rights, the plaintiffs filed this suit. In so doing many essential matters were overlooked and hence the technical obstacles that have been raised in the preliminary objection. It is interesting to note that after the preliminary objection had been raised, the plaintiffs were able to bring to court a Gazette Notice of exemption under section 24 of the Land Control Act. But it must be remembered that the dispute relates to a piece of land known as L.R No. 31 Ruaraka/Nairobi. The Gazette Notice showing that the transactions had exemptions from the President refers to different parcels of land. These are Nairobi/Block 31/4 and Nairobi/Block 31/24, Nairobi Block 31/33, Nairobi/Block 31/2 and Nairobi/Block 31/26 and Nairobi/Block 31/32. It is no clear whether these parcels of land are the same as the land in dispute.

The history of this dispute is that the sale transactions started way back in 1970s. The process was slow as this was agricultural land and hence change of user was necessary. That was attempted but somehow abandoned. The plaintiffs then realized that they required exemption under section 24 of the Land Control Act. That appears to have been obtained in July, 1998 but that was well after the suit had been instituted in 1994. This means by the time the suit was instituted in 1994 the plaintiffs' claims could not be entertained and what they were seeking could not be granted. The question is whether at the time of instituting this suit in 1994 the plaintiffs had a maintainable claim against the defendant. Each of the plaintiffs pegged its claim against the defendant on certain sale agreements. These agreements have already been referred to and it has been shown that by the time the suit was instituted each of the plaintiff was out of time. Hence under Limitation of Actions Act (Cap.22 Laws of Kenya) the plaintiffs' claimed were time-barred. We also now know that this land in dispute was agricultural land and so any sale transaction required the consent of the relevant Land Control Board. An attempt to obtain this consent was frustrated when it was claimed (in one of the numerous applications before the court) that the defendant's representatives wanted to disrupt the meeting of the Land Control Board. In the end, no consent was obtained and hence by virtue of section 6(1) of the Land Control Act (Cap.302 Laws of Kenya) the sale transactions between the plaintiffs and the defendant were rendered void for all purposes. That means when the suit was instituted in 1994 the plaintiffs were relying on agreements which had been rendered null and void. Clearly, the preliminary objection based on section 6(1) of Land Control Act could not be resisted. If the plaintiffs were to revert on their claims based on adverse possession, that would not be entertained in this suit which was brought by way of a plaint as a claim on adverse possession can only be brought by way of originating summons (See *Bwana v. Said* (Supra) . What the plaintiffs and their legal advisers should do is to go back to the drawing board and see where they went wrong. It would appear that the parties were still in the process of finalizing their different sale agreements but due to impatency on part of the plaintiffs, this matter was rushed to court without any thought as to the legal consequences of such a step. This has led to this unhappy ending as far as the plaintiffs are concerned. As I have endeavoured to demonstrate the plaintiffs are not completely without remedy if only they could carefully study their relationship with the defendant and the law applicable.

In view of the foregoing, I have no alternative but to uphold the defendant's preliminary objection based on the Limitation of Actions Act (Cap.22) and Land Control Act (Cap.302). Consequently, the suit is struck out with costs to the defendant.

Delivered at Nairobi this 14th day of July, 2000.

E. O. O'KUBASU

JUDGE OF APPEAL