



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 54 OF 2019

**WILLIAM ODONGO GUYA.....APPELLANT**

**-VERSUS-**

**GEORGE OTIATO MBAYE.....1<sup>ST</sup> RESPONDENT**

**LAND ADJUDICATION & SETTLEMENT OFFICER**

**BONDO SUB COUNTY.....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the Judgement and/or Decree of the Hon. Wasike (SRM) delivered on the 13<sup>th</sup> December 2019 in Bondo ELC NO. 210 of 2016)

IN

**WILLIAM ODONGO GUYA..... PLAINTIFF**

**-VERSUS-**

**GEORGE OTIATO MBAYE.....1<sup>ST</sup> DEFENDANT**

**LAND ADJUDICATION & SETTLEMENT OFFICER**

**BONDO SUB COUNTY.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

William Odongo Guya (**hereinafter referred to as the appellant**) has appealed against the whole of the judgement delivered on 13<sup>th</sup> December 2019 dismissing the Plaintiff's suit with costs to the 1<sup>st</sup> defendant. The appellant had filed a suit against George Otiato Mbaye, Land Adjudication & Settlement Officer Bondo Sub County (**hereinafter referred to as the respondents**). The suit was filed on 11/08/16 and prayed for judgement against the Defendants jointly and severally for; an order for cancellation, revocation and/or rectification of parcel no. 4768 and have the same reverted back to its original parcel number 1018. He further prayed for a declaration that the 1<sup>st</sup> Defendant is only entitled to a portion of the original parcel number 1018 as per the agreement by the deceased. Moreover, a permanent injunction against the defendants, their agents, and/or servants from tilling, trespassing, fencing and/or in any other way whatsoever interfering on the suit land. He also prayed for damages and costs of the Suit

It was the appellants case that that the 1<sup>st</sup> respondent and the appellants father (now deceased) entered into a sale agreement in 1990 for the sale of parcel number 1018 and that the said portion was not inclusive of the homestead. That the 1<sup>st</sup> respondent through fraudulent misrepresentation acquired parcel number 4768 out of parcel 1018 by alienating the portions not sold to him and that the 1<sup>st</sup> respondent has been encroaching beyond the portions sold to him. He said that the subdivisions were done without his knowledge.

It was the 1<sup>st</sup> respondents case was that the appellants father sold to him parcel of land being a portion from the parcel known as Uyawi/Central Sakwa/1018 vide sale agreement dated 3/07/1990 and that the same had clear and marked boundaries. Upon subdivision, he was registered as the owner of parcel number 4768. He took vacant possession and that there was no homestead or any structure as alleged by the plaintiff. He has been in possession for 29 years. That the vendor lived in parcel 5215 where he was buried upon his death, the appellant lives in parcel 1354 whilst the 1<sup>st</sup> respondent is in possession of parcel 4768 and that he obtained a title deed on 24/5/17. The 1<sup>st</sup>

respondent further averred that the appellants claim (arising from a contract for sale of land and allegations of fraud) is misconceived and an abuse of the process of Court as the same is statute barred. The 2<sup>nd</sup> defendant did not enter appearance and did not therefore participate in the proceedings.

The trial Court delivered judgement on 13/12/2019 dismissing the plaintiff's suit with costs to the 1<sup>st</sup> Defendant. The Court found that the suit offended the mandatory provisions of section 4 of the law of Limitations Act and therefore is irredeemably unsalvageable. The Court further found that the sale agreement referred to by the plaintiff and which was not produced as evidence was against the provisions of the Contract Act and that fraud as alleged on the part of the 1<sup>st</sup> defendant had not been proved.

Aggrieved by the judgement of the Court, the Plaintiff filed this appeal against the whole judgement based on the following grounds;

That the Trial Magistrate erred in Law and in Fact;

- a. By failing to find that the transaction was null and void for want of Land Control Board Consent.
- b. In failing to make a finding on the issue of the requirement of the Land Control Board Consent
- c. In not appreciating that lack of Land Control Board Consent rendered the transaction relating to the land void for all purposes.
- d. In not appreciating that the lack of consent restores the parties to status quo, ante
- e. In finding that the suit was barred by provisions of the Limitation of actions Act.
- f. In failing to appreciate that the agreement relied on by the 1<sup>st</sup> defendant offended the provisions of S.3(3) of the Law of Contract Act Cap 23 Laws of Kenya.

The appellant prays that the judgement of the subordinate court be set aside and this Court orders for the cancellation and revocation of the 1<sup>st</sup> Respondent's title.

On 25/01/21 and in the presence of both counsels for the appellant and the 1<sup>st</sup> Respondent, the Court directed that the appellant files and serves submissions within seven days and the respondent do file within seven days of service. Only the 1<sup>st</sup> respondent filed submissions on 04/03/21. The gravamen of the respondent's submissions are that the plaintiff's claim having arose from a contract for sale of land and founded on allegation of fraud is statute barred by virtue of the provisions of the Limitation of Actions Act and that the same goes into the jurisdiction of the Court and that the Court should not entertain suits that are statute barred. The respondent relied on the case of ***NBI CA NO. 100 OF 2015 (UR 81/20140 MR. AND MRS. JUSTICE E. TORGBOR V LADISLAUS ODEYO OGUOK and NBI NO. 292 OF 2013-BOSIRE OGERO V ROYAL MEDIA SERVICES.***

The purported agreement referred to by the Plaintiff purports to indicate that it was a tripartite agreement for sale of land and the same is not an agreement as it was not signed by any of the three parties.

That the claim is for recovery of land (as admitted by the plaintiff in their submissions) to the extent that it is intended to benefit the estate of the deceased vendor and as such the same is statute barred as it ought to have been commenced within twelve (12) years in line with section 9(2) of the Limitation of Actions Act.

That the right of action accrues from the date of death of the deceased only where the deceased was in possession of the land which was not the case here, and as such, submission by Counsel that the cause of action is within 10 years is misleading and ought to be rejected.

It was upon the appellant to prove the allegation that the transaction between the appellant's father and the 1<sup>st</sup> Respondent was void for want of consent. It was for the appellant to prove that there was no consent.

That the Land adjudication act was enacted in 1968 whereas the Land Control Act was enacted in 1967 and as such the issuance of the consent was not applicable to parcels that were and are still subject to adjudication as they are regulated by the land adjudication Act.

Being a first appeal, the role to be played by the court is set out in in ***Selle and another v Associated Motor Boat Company Ltd and others*** [1968] 1 EA 123 (referred to in ***David Oteba Ooko v Peter Joe Emongor*** [2020] eKLR):

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

It was also held in ***Mwangi v Wambugu*** [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

It is my view that the appellant's grounds of appeal can be condensed into three;

1. That the Court failed to appreciate that the agreement relied on by the 1<sup>st</sup> defendant offended the provisions of S.3(3) of the Law of Contract Act
2. Court's failure to make a finding on the issue of the requirement of the Land Control Board Consent.
3. The Court erred in law and in fact in finding that the suit was statute barred by provisions of the limitation of actions act

**a. That the Court failed to appreciate that the agreement relied on by the 1<sup>st</sup> defendant offended the provisions of S.3(3) of the Law of Contract Act**

The plaintiff in his submissions at the lower court (page 112 of the Record of Appeal) submitted that the agreement produced by the 1<sup>st</sup> defendant did not meet the requirement of the law and was contrary to section 3(3) of the Law of Contract Act Cap 23 in that there was no certainty of the land that was being sold.

I have looked at section 3(3) of the Law of Contract Act Cap 23. It provides as follows;

**(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto;**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

I have also looked at the contract produced by the defendant as DEXH-1 and do find that the same meets all the requirements set out in section 3(3) of the Law of Contract Act. The same is in writing. It has been signed by both the vendor and the purchaser. The signature of the vendor is evidenced by way of his left hand thumb. The appellant did not raise any issues as regards the authenticity of the thumb print. The same therefore suffices as the vendor's signature. See the case of *David Oteba Ooko v Peter Joe Emongor [2020] eKLR*.

The signatures of both the vendor and the purchaser have been witnessed by an advocate, J.W Anyango Ogutu. In addition, the vendor's signature was further witnessed by Jeremiah Abidha Guya whereas the purchaser's signature was witnessed by Vincent Mbaye Ochoro.

As to the certainty of the land being sold, the agreement was clear that what was being sold was land parcel no. Uyawi/Central Sakwa/1018. The defendant clarified in his evidence and testimony that the agreement was with regard to a portion of the said property, and which portion was later registered as parcel no. 4768. This evidence was not challenged and/or the contrary proved by the appellant. In fact, it was the appellant's evidence that the parcel was sold to three other people. There is therefore no way the defendant could have bought the whole parcel.

The agreement by all means was valid as it satisfied the requirements of section 3(3) of the Law of Contract Act.

**b. Court's failure to make a finding on the issue of the requirement of the Land Control Board Consent.**

It was the appellant's submission that the sale transaction was void as it did not comply with section 6(1) of the Land Control Act as to the obtaining of the Land Control Board's consent for subdivision and transfer.

The respondent has on the other hand submitted that the consent was not applicable in the circumstances as the parcels of land were and are still subject to adjudication as they are regulated by the Land Adjudication Act. This happens to be the position as was held in *Joanes Ondego Oywech v Alex Omondi Ogolla [2017] eKLR* where the Court held that was understandable that the respondent could not obtain the consent immediately or within six months of entering into the sale agreement as the process of adjudication was not completed. The Court was however alive to the fact that the Consent ought to have been applied for once the adjudication process was finalized.

It is a fact that the suit land was subject to the Land Adjudication Act at the time of the sale in 1990. The letter dated 26/10/15 produced by the defendant as DEXH-2 clearly indicates that the subject land is under Bondo/Nyangoma Adjudication section and was still under adjudication process under Cap 284 Laws of Kenya as at 26/10/15. It is my opinion that the transaction required the consent of the Land Control Board on the basis of the finding of the Court in *Jeremiah Kiilu Maitha v Agnes Ngeki Mutie [2018] eKLR* where the court stated;

**‘The Agreement that was entered into between the Appellant and the Respondent shows that plot number 190 was within Malunda Land Adjudication Section. It is therefore obvious that the suit land was in an adjudication area by the time it was sold. All land under an adjudication area falls within what used to be trust land under the repealed Trust Land Act or Community land under the Community Land Act. Invariably, all Trust Land/Community land is agricultural land. 15. According to the definition of “agricultural land” by Section 2 of the Land Control Act, all land that is not within a Municipality or a Township or a Market is agricultural land. However, the Minister may declare any land in the Nairobi Area or in any Municipality, Township or Urban centre “agricultural” for the purposes of the Act. 16. Considering that the suit land was within an adjudication area, and in view of the fact that the Defendant never produced evidence to show that**

**the suit land was within a Municipality, Township or Market, it follows that the suit land was agricultural land...'**

DW1's evidence at the trial Court was that he went to the Land Control Board sitting in Nango-Uyawu and obtained the necessary consents for the transfer. On that particular date, which he does not remember, he went with his father, the vendor and Jeremiah. DW1 did not however produce the board minutes or the Consent before the trial Court. This could be attributed to the fact that the consents were obtained long time ago and it may prove difficult to locate the documents at this point in time.

However, it is my view that the property would not have been registered in the 1<sup>st</sup> Respondent's name if the relevant registering authorities were not satisfied that the relevant consents had been obtained. The letter dated 26/10/15 produced by the defendant as DEXH-2 clearly indicates that DW1 is the registered owner of the Parcel No. 4768 and that issuance of titles was awaiting the conclusion of the adjudication process. The appellant did not challenge the validity of the said letter. The 1<sup>st</sup> respondent testified that he was issued with a title deed in 2017.

In any event, the Court in *Jeremiah Kiilu Maitha v Agnes Ngeki Mutie [2018] eKLR* stated that **in a situation where a Sale Agreement is null and void for want of the consent of the Board, a purchaser can still succeed to have such land registered in his favour if he proves that he took possession of the land and has been in such possession continuously, exclusively, peacefully and with the knowledge of the registered owner for a period of twelve (12) years.** It is the 1<sup>st</sup> defendant's case that he has been in possession of the suit property for 29 years, since 1990 when he purchased the same. Of the 29 years he has been in possession, the vendor (defendant's father) was alive for 16 years and never raised any concern as to the illegality of the 1<sup>st</sup> defendant's occupation. The plaintiff waited for a further 10 years after his father's death before he filed this suit in 2016.

Based on the above I find that even if the Land Control Board Consent was not issued as alleged, the 1<sup>st</sup> respondent had a valid title on the basis that he has stayed on the suit property for 26 years without any interruption and also holds a valid title to the property.

**c. The Court erred in law and in fact in finding that the suit was statute barred by provisions of the limitation of actions act**

The Plaintiff/appellant avers that the transaction culminating in the registration of the 1<sup>st</sup> respondent as the proprietor of title no. 4768 is void ab initio for want of Land Control Board Consent. He further states that the registration in favour of the 1<sup>st</sup> defendant was procured through fraud by the defendants and that the same should be cancelled and the same reverted back to the original title being parcel no/ 1018.

It is the respondent's submission that the plaintiff's claim is for recovery of land (as admitted by the plaintiff in their submissions at the trial court) to the extent that it is intended to benefit the estate of the deceased vendor and as such the same is statute barred as it ought to have been commenced within twelve (12) years in line with section 9(2) of the Limitation of Actions Act.

The appellant seeks to have the agreement entered into between his deceased father and the 1<sup>st</sup> defendant nullified.

Section 4(1) (a) of the Limitation of Actions Act provides

**4 (1) 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)...**

It is not disputed that the sale agreement was executed in 1990 and that the suit was brought in 2016, 26 years later. This is clearly in contravention of section 4(1) (a) which requires that a suit be brought within 6 years.

Section 7 of the Limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. In *David Oteba Ooko v Peter Joe Emongor [2020] eKLR* the plaintiff's father died on 1st November 2009 whereas the defendant had taken possession of the suit land in 1980 and got registered as proprietor of the suit land in 1989. The Court was of the view that even if the plaintiff's father had any claim over the suit land, it had become statutory time barred **at the expiry of 12 years from the time the defendant took possession and or got registered as proprietor.**

I therefore agree with the respondent that the right of action accrues from the time the defendant took possession and not from the time of the death of the deceased. The 1<sup>st</sup> defendant took possession in 1990. The suit was filed in 2016, 26 years later. The same is therefore statute barred on the basis of section 7 of the limitation of actions act.

The plaintiff has also alleged fraud. Section 26 of the limitation of actions act is to the effect that the period of limitation for fraud begins to run when the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. The plaintiff averred at paragraph 14 of the Plaintiff that he discovered the irregularity when he was stopped by the 1<sup>st</sup> defendant from cultivating the unsold portion of the said land. He has not indicated which date that was. However, from the letter dated 21/7/2016 (page 18 of the record) by the land adjudication officer, and though the same was not produced as evidence, this court is convinced that the plaintiff detected the alleged fraud on or around July 2016. The suit was filed in August 2016. The claim based on fraud was therefore not statute barred.

The plaintiff has at paragraph 16 of the Plaintiff particularized fraud on the part of the defendants as;

- a. Transferring and/or subdividing parcel number 1018 and registering part of the same as parcel no. 4768 in the name of the 1<sup>st</sup> defendant.
- b. Effecting the said transfer and/or change of the numbers without the consent and the authority of the plaintiff and/or deceased.
- c. Fraudulently and illegally changing the parcel number without any supportive documents.
- d. Failing to disclose to the plaintiff land transactions effecting the plaintiff's land parcel number 1018.
- e. Fraudulently and illegally issuing the 1<sup>st</sup> defendant with parcel number 4768.

It is my view that the plaintiff having alleged fraud, he was duty bound to prove the same. In *John Mbugua Gitau v Simon Parkoyiet Mokare & 6 others [2014] eKLR*, the Court held that;

**‘The petitioner having alleged fraud and irregularities on the part of the 2nd and 3rd Respondents was duty bound to provide proof to the required standard. The burden of proof rests with whoever alleges. In the present petition the legal burden to prove fraud, discrimination, unfair procedure and breach of the constitution provisions pleaded ... lies with the petitioner.**

**The burden of proof on the person who alleges fraud is on a standard higher than on a balance of probabilities adopted in ordinarily civil cases but lower than proof beyond a reasonable as in criminal cases. It is somewhere in between.’**

Based on the preceding findings, I am of the view that the plaintiff did not prove fraud on the part of the respondents. The 1<sup>st</sup> respondent proved to the satisfaction of the Court that he followed the correct procedure in obtaining the title for parcel no. 4768. The balance of convenience is also in favour of the 1<sup>st</sup> defendant given that he has been in quite possession of the suit property for 26 years and even has a title deed. The upshot of the above is that the appeal lacks merit and is dismissed with costs to the 1<sup>st</sup> defendant.

**DATED AT KISUMU THIS 29<sup>th</sup> DAY OF APRIL, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**