REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C APPEAL NO 23 OF 2019

KIRAITA ABUTA.....APPELLANT

VERSUS

RICHARD NYANDIKA.....RESPONDENT

(An appeal from the judgment of Hon. E.A Obina-Principal Magistrate delivered on 20th August 2019)

JUDGMENT

INTRODUCTION

1. The Appellant filed this appeal against the judgment of Hon. E.A Obina, Principal Magistrate delivered on 20th August 2019 in Kisii CMCC No. 814 of 1999 whereby the court entered judgment for the Plaintiff and granted an order of Specific Performance.

2. Before delving into the appeal it is necessary to give a brief background of this case. In the case before the lower court which was initially filed on 5th January 1988 as HCCC No. 3 of 1988 before it was transferred to the Chief Magistrate's Court as Kisii CMCC No. 814 of 1999), the Respondent (then Plaintiff) filed suit against the Defendant alleging that by a written agreement dated 21st March 1979, the Appellant (then Defendants) had sold the plaintiff a portion of land parcel number EAST KITUTU/MWAMANG'ERA/616 at an agreed purchase price of Kshs 12,500 which the Respondent paid in full. The Appellant subsequently gave the Respondent vacant possession of the suit property but refused to transfer the same to the Respondent. The Respondent therefore prayed for an order of specific performance and costs of the suit.

3. In his Defence dated 1st March 1988 the Appellant denied the Respondent's claim and pleaded that "the agreement was rendered invalid by effection of time" (sic).

After a considerable period of time, the suit was set down for hearing and both parties testified and called their witnesses.

4. The Respondent who testified as PW1 testified that he entered into a contract with the Appellant for the sale of land parcel No. East Kitutu/ Mwamangera/616 measuring 1.1 hectares at an agreed purchase price of Kshs.12,500. He paid the purchase price in full after which they obtained the consent of the Land Control Board. He produced the sale agreement and the Consent letter as his exhibits. It was his further testimony that the Appellant subsequently refused to sign the transfer forms. He then instructed his advocates to write to the Respondents to collect a refund of the purchase price, but the Respondents did not collect the purchase price as he wanted the land not the money. Upon cross-examination, he clarified that even though the written agreement was signed in 1979, he had bought the land in 1975. He said he cultivated it for six years up to 1989 when he left due to the threats he was receiving from the Appellant.

5. The Plaintiff called Benson Leparmorijo, the Deputy County Commissioner, Masaba North Sub-County, Nyamira County who confirmed that a consent had been issued by the Manga Land Control Board for sub-division of the suit property into two portions measuring 1.1 hectares each.

6. On his part the Appellant testified that he sold a parcel of land measuring 1.1 hectares to Richard Nyandika at an agreed price of Kshs. 12,500 which he was paid in full. He later repudiated the agreement as his late father objected to it since the Respondent was related to them through marriage as he had married the Appellant's sister. He stated that he was ready to refund the purchase price as he had ten children who were staying on the suit property. That marked the close of the Defendant's case after which the parties were granted time to file their submissions. The same were duly filed and they are on record.

7. The court in its judgment dated 20th August 2019 framed seven issues for determination as follows:

i. Whether there was a sale agreement between the Plaintiff and the Defendants over the subject matter.

ii. What was the consideration and whether the said consideration was paid.

iii. Whether the purchaser took possession of the land.

iv. Was the transfer process completed?

v. Whether the consent of the Land Control Board was sought.

vi. Whether forgery has been proved on the part of the Plaintiff.

vii. Whether the Plaintiff has proved his case against the Defendants on the required standards beyond reasonable doubt

viii. What should be the order on costs.

8. After analyzing the evidence, the trial Magistrate concluded that the Plaintiff had proved his case on a balance of probabilities and entered judgment for the Plaintiff as prayed in the Plaint. He proceeded to issue an order of specific performance and directed that the Defendants to sign all the relevant transfer documents failing which the Executive Officer would sign the same on their behalf. Being aggrieved by the said judgment, the Appellant filed this appeal citing the following 9 Grounds of Appeal:

i. The learned Principal Magistrate erred in law and in fact by granting the Respondent the order of Specific Performance of the sale agreement barred by operation of the law.

ii. The learned Principal Magistrate erred in law and in fact by failing to consider and apply the provisions of the Law of Limitation of Actions Act, than proceed to dismiss the Respondent's suit and instead granted the order of Specific Performance and by so doing arrived at a wrong decision.

iii. The learned Principal Magistrate erred in law by failing to hold that the issue of Limitation of Actions goes to the jurisdiction of the court and consequently ought to have found that the court lacked jurisdiction to grant the order of Specific Performance.

iv. The learned Principal Magistrate erred in law and in fact by disregarding the Appellant's evidence on record as to why the transfer was initially denied and by so doing arrived at a wrong decision.

v. The learned Principal Magistrate erred in law and in fact by ignoring and/or disregarding the practical difficulties the order of specific performance will cause to the Appellant and his family contrary to the requirements of the principles of equity in granting specific performance in similar situations.

vi. The learned Principal Magistrate erred in law and in fact by disregarding the Appellant's plea of Limitation of time as contained in his defence.

vii. The learned Principal Magistrate erred in law and in fact by failure to hold that the Respondent's agreement for sale is time barred having been filed more than six years, since its execution contrary to the requirements of section 4(2) of the Limitation of Actions Act Chapter 22 of the Laws of Kenya.

viii. The learned Principal Magistrate erred in law and in fact by failing to consider and apply the authorities cited by the Appellant and in doing so arrived at a wrong decision.

ix. The learned Principal Magistrate erred in applying and misinterpreting and misapplying the authorities cited by the Respondent and by so doing arrived at the wrong decision.

9. The appeal was canvassed by way of written submissions and both parties filed their submissions which I have carefully considered. This being a first appeal, this court is enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See **Selle vs. Associated Motor Boat Company (1968) EA 123.**

ISSUES FOR DETERRMINATION

10. Having considered the proceedings, judgment and Grounds of Appeal together with the rival submissions, the main issues for determination are as follows:

i. Whether the plea of limitation was sufficiently raised by the Appellant in his Defence.

ii. Whether the order of Specific Performance was warranted.

11. Grounds 1, 2, 3, 6 and 7 all touch on the issue of limitation. The Appellant's contention is that the court failed to hold that the Respondent's suit was barred by virtue of the provisions of the Limitation of Actions Act.

Section 4(a) of the Limitation of Action Act provides that,

> ***4. Actions of contract and tort and certain other actions***
>
> ***(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;***

12. It is counsel's submission that the contract for the sale of land was entered into on 21st March 1979 and therefore the suit ought to have been filed before 21st March 1986. The instant suit was filed on 5th January 1988 after a period of more than six years and it was hence time-barred. Counsel cited the case of **Bosire Ogero v Royal Media Services Limited (2015) eKLR** where Aburili J held that where a matter is statute barred, the court has no jurisdiction to entertain it even if the Defendant did not raise the issue of jurisdiction. He argues that once the trial court realized that it had no jurisdiction, it should have downed its tools.

13. On the other hand, counsel for the Respondent has submitted that a party who wishes to rely on the Defence of limitation must specifically plead it in his Defence and failure to plead the relevant statute he wishes to rely on, bars a party from raising the same at any stage of the trial. Counsel relied on Order 2 Rule 4 of the Civil Procedure Rules 2010 which provides as follows:

> 4(1) **"A party shall in any pleading subsequent to a Plaint plead specifically any mater, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality**
>
> **(a) Which he alleges makes any claim or defence of the opposite party not maintainable**
>
> **(b) Which if not pleaded, might take the opposite party by surprise or**
>
> **(c) Which raises issues of fact not arising out of the preceding pleading**

14. In the case of **Mohamed Abdikadir Mohamed v Sammy Kagiri & Another (20160)eKLR** the court elaborated the provisions of Order 2 Rule 4 of the Civil Procedure Rules , 2010 as follows:

> ***"In my understanding, our law on pleadings as encapsulated in Order 2 Rule 4 of the CPR is that, the party relying on limitation should specifically plead it. He may or may not do so for any or no reasons at all. Thus the plaintiff is entitled to wait to hear from the defendant whether limitation is taken up as a defence. If the defence is taken, it is upto the Plaintiff to bring his case within the exceptions to the Limitation of Actions Act or other statutes of limitation as the case may be. There are good reasons for the position of the law that the defence of limitation should be pleaded specifically. First it is intended to avoid ambush upon taking the plaintiff by surprise on such a fundamental issue as limitation of actions. Second, the Plaintiff is notified of the defence of limitation, in effect, he is told that his claim is not maintainable in law. And third, the Plaintiff gets the opportunity to plead such facts as are necessary to bring his claim within the exception of section 27 of the Limitation of Actions Act. Ordinarily he will do so in his Reply to Defence. Accordingly, a party who wishes to invoke or rely on a defence of limitation must specifically plead it in his defence or any other subsequent pleading, if he is to rely on limitation as a basis for defeating the plaintiff's claim.***
>
> ***"… I must admit that the requirement of Order 2 Rule 4 is not merely a matter of form which can be diminished by Article 159 (2) (d) of the Constitution of Kenya 2010. It is a rule which serves substantive justice and a pertinent component of fair hearing, for it prevents a party from taking the other by surprise on an important matter as defence of limitation. I am conveying a subtle judicial hint; that a defence of limitation if successful, is not a mere pin-prick thrust or just a rapier like stroke; it is a sure downright bludgeon -blow on the Plaintiff's suit. It will completely defeat the Plaintiff's claim. Therefore, for a party to enjoy the exception to the rule and challenge an ex-parte order of extension of time, must give the other party proper notice of his defence on limitation so that the party to be affected will have an opportunity to plead such facts as are necessary to bring his case within the exception of section 27 of the Limitation of Actions Act"***

15. The same position was adopted by the Court of Appeal in the case of **Stephen Onyango Achola & Another v Edward Hongo Sule & Another (2004) eKLR** where the Court of Appeal in considering the provisions of Order V1 Rule 4 and 2 of the Civil Procedure Rules which are similar to the provisions of Order 2 Rule 4 of the Civil Procedure Rules 2010 held as follows:

> "***The claim by the two Appellants was for recovery of land. The second Respondent was relying on the provisions of a statute, that is Act No 5 of 1974 to defeat that claim. The provisions of order VI rule 4 (1) and (2) required him to specifically plead the statue on which provision he relied to defeat the appellants' claim. Support for order VI rule 4 (1) and (2) is to be found in Halsbury's Laws of England, 4th Edition, vol 36 at paragraph 48 page 38 headed:***
>
> ***"Matters which must be specifically pleaded: The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matters are performace, release, any relevant statute of limitation, fraud or any act showing illegality. Other matters which must be so pleaded are the Statute of Fraud, and the provision of the Law of Property Act, 1925 which requires contracts for the sale or disposition of land to be in writing, and, it seems, any ground of objection to the jurisdiction of the Court."***

16. In the instant case, the Defendant at paragraph 2 of his defence pleaded that:

> "*The defendants admit the contents of paragraph 3 of the plaint but aver that the said agreement was rendered invalid by effection of time"* (sic)

17. There is no mention of the statute of limitation as required by Order 2 Rule 4 of the Civil Procedure Rules. The Appellant can therefore not be allowed to rely on limitation as a defence as he failed to comply with the provisions of Order 2 Rule 4 of the Civil Procedure Rules. His belated attempt to elaborate on the issue of limitation in his submissions does not help his case as he ought to have specifically pleaded the relevant statute of limitation in his defence so as not to take the Plaintiff by surprise.

18. Be that as it may, even assuming that the Respondent's claim was barred by section 4 (1) of the Limitation of Actions Act as it was filed more than six years after the sale agreement was entered into, counsel for the Respondent has argued that the same should be treated as claim for recovery of land whose limitation period is 12 years as provided under section 7 of the Limitation of Actions Act. There is no dispute that the Respondent paid the purchase price in full and took possession of the suit property for a period of six years before the Appellant purported to change his mind. By seeking an order of specific performance, the Respondent was actually seeking to recover the land that he had bought from the Appellant. See the case of **Anne Murambi v John Munyao Nyamu & Another (2018) eKLR** where in a claim for specific performance, the court held that the action constituted an action to enforce a contract as well an action to recover land.

19. The second issue I have to determine is whether the order of specific performance was warranted. It is common ground that the Respondent had performed his part of the agreement before the Appellant purported to rescind the same. He then made an offer to refund the purchase price which was not accepted by the Respondent and this is what prompted the Respondent to institute this suit. It is trite law that an order of specific performance is an equitable remedy which must be granted on well known principles. In the case of **Thrift Homes Ltd v Kenya v Kenya Investment Limited (2015) eKLR** the court stated as follows:

> "***Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be order if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy"***

20. Additionally, in the case of **Andrew Murugu Maina & Another v Johnson Ngarari Mwaura (2019) eKLR,** the court referred to the Supreme Court of Uganda 's case of **Manzoor v Baram (2003) E.A 580** where the court held that

> ***"Specific Performance is an equitable remedy grounded in the maxim that equity regards as done, that which ought to be done. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard the courts have long considered damages an inadequate remedy for breach of contract for the sale of land and more readily decree specific performance to enforce such contracts as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant the relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims as found by the trial court and through technicalities.***

21. Counsel for the Appellant has submitted that the Respondent is not entitled to the order of specific performance as he argues that the Appellant rescinded the contract as he realized that there was a mistake. He also argues that a refund of the purchase price would be an adequate remedy. The reason that the Appellant gave for rescinding the contract is that the Respondent is married to the Appellant's sister. This fact must have been known to the Appellant at the time he entered into the contract. In any event this is not a legal ground for rescinding a contact.

22. As to whether a refund would be an adequate remedy, there is no doubt that the value of land has appreciated considerably over the last 40 years and it would be unreasonable to refund the Respondent based on the value of the land in 1979 as that would not be an adequate remedy. I have already held that the suit was not filed out of time as it is a claim for the recovery of land.

23. All in all, I cannot fault the trial magistrate for finding in favour of the Respondent and making an order of Specific Performance. The upshot is that I find no merit in the appeal and I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kisii this 6th day of October, 2021.

J.M ONYANGO

JUDGE.