REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 185 OF 2013

JOSEPH MWANIKI MUCHIRA.....APPELLANT

VERSUS

GODFREY MUCHANGI.....RESPONDENT

JUDGMENT

1. The respondent had filed a case **Kerugoya SRMCC No. 21 of 1996** against the appellant seeking an order of transfer of **L.R Mwea/Mutithi/Scheme/113**. The suit was based on the ground that he had bought the suit land from the appellant sometime in 1981 and he took possession of the same. however, the appellant refused to transfer the suit land to him.

2. The defendant in the suit failed to enter appearance or file defence and ex-parte judgment was entered. The matter proceeded for formal proof and unfortunately the respondent's claim was dismissed on 28/08/1996. Being aggrieved with the said judgment, he proceeded to file **Nyeri HCCA No. 52 of 1996** and his appeal was allowed on 18/10/2000. Thereafter he conducted a search and found the suit land had been transferred to Joseph Mwaniki Muchira on 06/09/1996 and then to Samuel & Betty Kungu on 04/10/1996. The Judgment in Nyeri HCCA No.52/1996 could not be executed as the land had a new owner. The respondent applied for a review of the High Court judgment and a retrial was ordered.

3. In the application dated 7.12.2010, the respondent sought to be allowed to amend the plaint and include Joseph Mwaniki Muchira, Samuel Kungu and Betty Kungu as the 2, 3rd and 4th defendants respectively. He also included the claim for fraudulent transfer of the suit land. The application was allowed in the ruling delivered on 12/03/2012 and the respondent was granted leave to amend the plaint.

4. The appellant has now filed an appeal seeking that the judgment and all consequential orders be set aside. The appeal is based on the grounds that the learned magistrate erred in granted leave to enjoin to answer to fraud which was committed in 1996 long after expiry of limitation period. That the application giving rise to the ruling was defective since it was brought by way of notice of motion instead of chamber summons and the parties ordered to be enjoined were neither served nor heard prior.

5. On 15.9.2016 directions were given that the appeal proceeds by way written submissions. The parties filed submissions. On 7.11.2016 the Deputy Registry informed the parties that judgment would be delivered on notice and the file would be forwarded to Justice Limo.

6. On 22.9.2017 the file was placed before Justice Limo but the parties did not appeal. It would seem the judgment had not been written and the file was ordered to be returned to the registry.

7. It was not until 20.7.2017 when the matter was mentioned before me and order was made to the file to be forwarded to Justice Limo. It would seem that the file was not forwarded to Justice Limo. The parties

appeared before me on 27.9.2018 and agreed to take a date of judgment before me. I have found it fit to give this background as there has been unreasonable delay in giving the judgment in this matter.

8. In submissions on behalf of the appellant JOSEPH MWANIKI MUCHIRA it is submitted that the appellant was not a party in the plaint filed by the respondent GODFREY MUCHANGI in the Magistrate's Court. The respondent filed an application 11.7.2003 seeking an order that the appellant. SAMUEL THIONGO KUNGU and his wife BETTHY JANE W. KUNGU be enjoined in the suit. He filed another application dated 7.12.2010 seeking to enjoin the three as parties. The application was allowed on 22.3.2012. The ruling is the subject matter of this appeal.

9. It is submitted that the trial Magistrate erred in law and fact by granting leave to the respondent to amend the plaint to enjoin parties to answer allegations of fraud which were committed in the year 1981 (sic) long after the expiry of the limitation period. He relies on ***Section 4(2) of the Limitation of Actions Act Cap.22 Laws of Kenya*** which provides that claims based on fraud are time barred after the expiry of 3 year from the date on which the cause of action arose.

10. The appellant relies ***on Stanley & Sons Ltd Vs. D.T. Dobie & Co., T. Ltd & Another [1995] E.A. 84*** where the plaintiff applied for leave to substitute a new defendant more than six years after the cause of action arose. The court held that the amendment would not be allowed to join a stranger to the suit after the expiry of the Limitation period. He also relies on Kenya Ports Authority Vs. East African Power & Lighting Company [1982] KLR 410 where the court held that the application to amend could not be allowed as it was made at a very late state in the proceedings.

11. The appellant also relies on the case of ***Atieno Vs. Omoro [1985] KLR 677*** where the Court stated that as the new party was added in the suit through amendment, after the plaintiff had lost the right to sue by virtue of the Limitations of Actions Act, the only option available be to the plaintiff was to obtain leave of the court under the relevant provision of the said Act to institute proceedings out of time.

12. The appellant further submits that the trial Magistrate was wrong to join his co-respondents without giving them a chance to be heard as they were never served with the application.

13. For the respondent it was submitted that the respondent discovered the fraud in the year 2001. He submits that being a claim to recover land, at the time of filing the application the suit was not statute barred. He relies on ***E.L.C No.126/2011 Justus Tureti Obara Vs. Peter Kaipeitai Nengiso*** where it was held that the claim to recover property was not statute barred as the limitation period for such a claim is 12 years as provided for in ***Section -7- of the Limitation of Acts Act Cap. 22 Laws of Kenya.*** He submits that the respondent discovered the fraud in 2001 and obtained orders to join the appellants in 2012. He submits that the order for retrial was not issued in vain. On the issue of application being filed as a notice of motion and not a chamber summons, it submitted that it is a procedural technicality which is cured under Article 159 (2) (d) of the Constitution which calls on court to do substantive justice other than giving undue regard to procedural technicalities. On the issue of 3rd & 4th respondent the respondent submits that they are not keen to defend the suit as they were served and never respondent. That the application to amend was brought at the earliest convenience. He prays that the appeal be dismissed.

14. The impugned ruling of the trial Magistrate was that since the defendants sold land to 3rd parties, it was only fair and just that they be enjoined as defendants so as the suit is not rendered nugatory.

15. I have considered the grounds of appeal and the submissions. The 1st issue which arises is limitation. The appellant is claiming that the matter involves fraud which was committed in 1996 and therefore at the time of filing the application the limitation period had expired.

16. Section 26 of the Limitation of Actions:

> ***Where, in the case of an action for which a period of limitation is prescribed, either –***
>
> ***(a) the action is based upon the fraud of the defendant or his agent, or of any person through***

whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences* of a mistake*, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

17. This is to say that time starts to run when the plaintiff discovers the fraud. So where fraud committed and does not come to the notice or is not known by the party who is affected by it and who would be entitled to sue as a plaintiff time does not run. Time starts to run when the would be plaintiff becomes aware of the fraud. The respondent contends that he discovered the fraud in the year 2000 after his appeal in the High Court was allowed. The fraud allegedly committed by the appellant was in 1996 but discovered in the year 2000. The limitation period started to run in the year 2000 and at the time of filing the application to amend the plaint and enjoin the interested parties, the limitation period had not expired. The time which courts is the time at which the suit was filed. If it was filed within time and determined by the court after the limitation period, the decision is proper. Though the application which eventually allowed the application was filed on 7.12.2010, the respondent had filed the application and served way back on 18.2.2001.

18. The claim by the respondent was based on land. He applied to enjoin in the year 2001 after he discovered the fraud in the year 2000.

Section 7 of the Limitation of Actions:

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.

19. The amended plaint included a claim to recover land. the limitation period for a claim to recover land has a limitation period of twelve years. The alleged fraudulent transfer was in the year 1996. At the time the respondent applied to amend the plaint to include the appellant, the time limited to file a claim to recover land had not lapsed. I find that the authorities relied on by the appellant though binding, do not apply to the circumstances in this case. The respondent moved the court within the time limited for filing the claim against the appellant. In both situations, that is the claim to recover land and the allegations of fraud time started to run from the year 2000 and the limitation period had not expired by the time the respondent filed application to amend the plaint and to enjoin the defendants.

20. The court exercises discretion to allow a party to amend his plead in order to meet the ends of justice. **Order 8 rule (3) (1) & 2 of the Civil Procedure Rules** provides:

Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

21. The respondent had been granted an order by the High Court for a retrial after he discovered that circumstances had changed. As held by the trial Magistrate found it was fair and just to allow the amendment to bring in the appellant and the other defendants so that the suit is not rendered nugatory. A retrial without joining in the appellant and the other defendants would be an exercise in futility as the respondent would and end up with orders he could not execute against persons who were not party to the suit. It would also render the order for retrial to be in vain. I find that the ground that the claim against

the appellant was time barred must fail. The application to join the appellant and leave granted to amend the plaint were filed within time.

22. **Defective application.**

i) Wrong provisions

The appellant claims the application was brought by way of Notice of motion instead of Chamber summons.

After quoting the provisions of **Order 50 Rules 10 and 11 of the Civil Procedure Rules** in ***Johnson J. Kinyanjui& Another Vs Rachael W. Thande & Another Civil Appeal No. 284 of 1997 (E.A.)*** **the Court of Appeal stated;**

It can be seen that no application is to be defeated by use of wrong procedural mode and a judge has discretion to hear it either in court or in chambers.

The complaint does not go to jurisdiction and no prejudice was caused to the appellant. Article 159 of the Constitution and section 1 A & 1 B calls on the court to do substantive justice and not to decide cases on procedural technicalities. The ground is without merit.

ii) Lack of service

The appellant claims the application dated18/01/2001 was never served on the 2nd – 4th defendants therein.

From the record of the proceedings, the appellant's advocate filed a notice of appointment dated 15/02/2011 for the 2nd defendant therefore the appellant cannot claim that the 2nd defendant was never served. The issue pending is whether the 3rd and 4th defendants were served. The respondent submits that the 3rd and 4th defendants were served with the orders by way of substantive service three years ago but they have not respondent. The appellant cannot be their mouth piece when they have not responded. The trial court will decide whether they were served or not. Though there is this appeal, the matter has not been determined by the lower court and it is too early to allege that the 3rd & 4th defendant have not been given a chance to be heard.

23. In conclusion:

I stated reasons why the grounds of appeal by the appellant must fail. My finding is that court orders are not made in vain. The ruling by the trial was within the law and in the circumstances of this case in the best interest of justice. I order that;

1. The appeal lacks merit.

2. The appeal is dismissed.

3. The suit before the trial court shall be heard between the respondent, appellant, the defendant and the enjoined parties and be determined on merits.

4. I award costs of this application to the respondent.

Dated at Kerugoya this 13th day of December 2018.

L. W. GITARI

JUDGE