REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

(CORAM: AKIWUMI, LAKHA, JJ.A. & BOSIRE, AG. J.A.)
CIVIL APPEAL NO. 164 OF 1995

BETWEEN

1. M/S RICHARD SATIA & PARTNERS

2. JESTIMORE SIMWENYI .. ..APPELLANTS

AND

SAMSON SICHANGI .....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Eldoret (Justice Aganyanya) dated 12th May, 1995
in

H.C.C.C. NO. 141 OF 1991)
****

JUDGMENT OF THE COURT

The first appellant who is the first plaintiff, is a partnership firm originally consisting of some twelve partners of which, the second appellant who is the second plaintiff, is one. The firm bought a large farm L.R. N o. 5335/24 in the Trans Nzoia District, in 1964, and the second plaintiff according to the plaint, sold in 1972, 4 acres of his share of

the farm to the defendant for 4,000/-. The respondent who is the defendant, made part payment and it seems went into possession of more land than had been sold him. In 1975, however, he asked for his money back but upon this being refunded, refused to vacate the second plaintiff's portion of the farm which he had been occupying. It was not till 9 years later, that the second plaintiff sued the defendant seeking among other things, his eviction from the part of the farm that he was occupying, and an injunction restraining him from interfering with the second plaintiff's peaceful enjoyment of his portion of the farm. The plaint originally filed by the second plaintiff was subsequently amended to include the partnership firm as the first plaintiff and to seek the reliefs sought in the original plaint.

The defendant in his defence to the amended plaint, denied knowledge of the lst plaintiff's ownership of the farm and of the second plaintiff's share in it. It was averred, however, that he had bought part of the farm without giving any description or details of it, from the second plaintiff for 1900/-and which sum, upon thediscovery that the second plaintiff had no land at all, in the farm which he could sell in the first place, the latter had refunded. In 1975, however, and in this regard, it is best to set out verbatim what the defence to the amended plaint states, that the defendant had:

"bought a portion of parcel LR 5335/24 from one Julius Mabusi together with others as tenants in common in equal shares and as such", the defendant was therefore, legally entitled to occupy the farm land he had bought.

The plaintiffs evidence at the trial was consistent with what was alleged in the amended plaint. It was also undenied that there was no consent of the appropriate Land Control Board to any transfer of any portion of the farm to the defendant. On the other hand, the defendant in his evidence, departed significantly from the averments contained in his amended defence. Whilst it had been averred as already indicated, that the defendant had bought the portion of land which he was occupying from Julius Mabusi, the defendant in his evidence, said that he had become entitled to occupy the farm by paying 10,000/-, not to Julius Mabusi, but to the Agricultural Finance Corporation which was owed money by the first plaintiff. Even though it was denied in the evidence of the plaintiffs that Julius Mabusi was a partner in the 1st plaintiff which if true, would have lent credence to the defendant's version of the facts, the defendant did not produce the receipt he got for his payment of 10,000/-to the Agricultural Finance Corporation. The defendant also did not call Julius Mabusi to give evidence but the learned Judge, wrongly, we think, did not only express the opinion that this did not matter, but also held that the plaintiffs, who were not required to establish the defendant's case for him, could have called Julius Mabusi to give evidence. The learned

Judge, them, on the basis of the evidence as summarized, held that the defendant had on a balance of probabilities, established that he had acquired a legal interest in the farm. Our assessment of the facts leads us to the opposite conclusion. The farm which is the subject matter of the dispute is undeniably, agricultural land in respect of which, any transfer of any portion thereof, or interest therein, by paying 10,000/-to the Agricultural Finance Corporation, is, according to section 6 of the Land Control Act, null and void for all purposes if the transfer has not as in this case, obtained the consent of the appropriate Land Control Board. The learned Judge was aware of this sta te of the law but preferred the view that the consent of the Land Control Board was irrelevant since there was a pending dispute over the farm and which, what is more, had not been subdivided. But we think that the learned Judge erred in this regard. The consent of the Land Control Board must, according to section 8 of the Land Control Act, be obtained unless the time is enlarged, within 6 months of the transaction which gives the defendant a claim in the farm namely, as he alleged, upon his payment of 10,000/-to Agricultural Finance Corporation which took place in 1975. No consent has ever been obtained and the time within which it must be obtained, was never extended. The defendant's purported purchase of interest in the farm is therefore null and void and though he may be able, and we do not make any pronouncement on this, to obtain a refund of the 10,000/-he paid to the Agricultural Finance Corporation from the first plaintiff, he certainly did not acquire any interest in the farm.

Lastly, the learned Judge went on to say that even if he was wrong in the conclusions we have referred to, that he had earlier come to, the defendant had established, though that is not what the defendant had at all, pleaded in his defence to the amended plaint, nor had this defence been amended to that effect, that he was entitled through adverse possession of over 12 years, to the ownership and possession of the portion of the farm occupied by him. Quite clearly, the learned Judge erred in dealing with this unpleaded issue which apart from anything else, must, according to O 36 r 3D of the Civil Procedure Rules, be sought by way of an Originating Summons. In the case of Charles C. Sande v. Kenya Cooperative Creameries LtdCivil Appeal No. 154 of 1992, (unreported) this court on 24th January, 1994, held that a Judge had no power or jurisdiction to decide an issue not raised before him and went to observe that:

> "In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position.... We would endorse the well established view that a Judge has no power to decide an issue not raised before Him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way

> to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallise the issues which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are...".

And so, the learned Judge ventured without jurisdiction onto an issue which no one had asked him to determin e. But assuming that the learned Judge could consider the issue of adverse possession, what was the evidence before him on that score? On the defendant's own showing, it appears that he paid the 10,000/-to the Agricultural Finance Corporation and on which fact, his claim to an interest in the farm is based, in 1975; he even produced an illegible agreement dated 29.3.75, intended to show that he was a partner in the first plaintiff; in his cross-examination he said that he was occupying the portion of thefarm that belonged to Julius Mabusi who left in 1975; and in his re-examination, that he "entered the house that was originally occupied by Mabusi himself". It can be said for argument sake therefore, that he had gone into occupation in 1975 or 1976, and this is also important, not as he said, of the portion of the farm in respect of which, the second plaintiff had refunded to him the part payment which he had made, but of that portion which the defendant said he had obtained from Julius Mabusi. The suit having been filed in 1984, the defendant can be said to have been in adverse possession if at all, not for 12 years as the learned Judge held, but for 9 years at most, from 1975, upon which adverse possession cannot be founded.

It is not surprising having regard to our observations about the judgment of the learned Judge, that the plaintiffs appealed against that judgment and on grounds which we have just discussed. In the result, the plaintiffs'/appellants' appeal must succeed and the judgment of the learned Judge set aside, with costs for the plaintiffs/appellants against the defendant/respondent. It is so ordered.

Dated and delivered at Nakuru this 14th day of March, 1997.

A.M. AKIWUMI
.....
JUDGE OF APPEAL

A.A. LAKHA
.....
JUDGE OF APPEAL

S.E.O. BOSIRE

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.