



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Nyarangi, Masime JJA & Kwach Ag JA)

CIVIL APPEAL NO 70 OF 1987

MICAH SIBO BULALI.....APPELLANT

VERSUS

MIRIAM JOSEPHINE CHARLES.....RESPONDENT

JUDGMENT

December 2, 1988, **Nyarangi, Masime JJA & Kwach Ag JA** delivered the following Judgment.

By a plaint filed in court sometimes in 1986 the appellant Micah Sibó Bulali claimed from the respondent Miriam Josephine Charles one acre of land out of land registered as title No W Ngunyore/Itumbu/848. The basis of the claim was pleaded in paragraph 4 of the plaint as follows:

“4 That during the year 1961 when pieces of land were being demarcated the plaintiff’s one acre of land was added to the defendant’s land and the defendant was issued with a land certificate known as W Ngunyore/ Itumbu/848 comprising both the plaintiff and the defendant’s land. The defendants promised to compensate the plaintiff with another piece of land measuring one acre and the defendant has failed to compensate the plaintiff with another acreage in the same measurement” (emphasis is ours)

In her written statement of defence the defendant stated that she was the first registered owner of the suit land which had initially been numbered as title No upon subdivision and transfer of a portion W Ngunyore/Itumbu/ 849 to a third party. She denied that the plaintiff’s land had been included in her land during demarcation and raised the issue of statutory limitation as follows:

“5 That if there was any promise to compensate the plaintiff in 1961 as stated in paragraph 4 of the plaint, which is denied, the transaction is now time barred.”

Appropriate directions were thereafter given and the suit was fixed for hearing. On March 31, 1987, when the case was called for hearing in the presence of the appellant learned counsel for the respondent took as a preliminary point the pleaded issue of limitation. After hearing both parties the learned judge ruled that on the pleadings before him the appellant’s cause of action was time barred and so he upheld the preliminary objection and dismissed the suit. This appeal arises from that ruling.

When this appeal opened for argument learned counsel for the appellant (who had hitherto been unrepresented) applied for and we allowed him leave to file an amended petition of appeal. The amended petition of appeal contains four grounds of appeal which may be summarised as follows: That the learned trial judge erred in law in holding:

1. That the cause of action arose in 1961 when there was no evidence or without calling for evidence to that effect;
2. That the plaint stated that the cause of action arose in 1961;
3. That the suit was time barred when in fact it was not so time barred.

Learned counsel for the appellant quite properly conceded that the alleged cause of action sounded in contract and that the subject matter was land. The appellant alleged that the respondent made the promise in 1961 but counsel claimed before us that there was some later acknowledgement of that promise by the respondent. That may well be so but no such averment was made in the plaint which was before the judge when the issue of limitation was raised.

It was clearly not for the learned judge to speculate or fill in the gaps in the pleadings for the plaintiff. Having considered the pleadings ourselves, we concur with the learned judge in his finding that the cause of action, if any, was clearly time barred. In the result we find no merit in this appeal and accordingly order it to be dismissed with costs.

Dated and delivered at Kisumu this 2nd day of December, 1988

J.O. NYARANGI

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JUDGE OF APPEAL

J.R.O. MASIME

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JUDGE OF APPEAL

R.O. KWACH

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Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR