



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Kneller, Hancox & Nyarangi, JJ.A.)

CIVIL APPEAL NO. 93 OF 1985

BETWEEN

1. JOHN ONYANGO

2. JAVAN O. BULEMI.....APPELLANTS

AND

SAMSON LUWAYI.....RESPONDENT

**(Appeal from a judgment/order of the High Court of Kenya at Kakamega (Aganyanya , J.) dated
29th day of May,**

1985

in

Civil Appeal No. 22 of 1985)

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JUDGMENT OF NYARANGI J.A.

A little more than three years ago the respondent Samson Luwayi, as plaintiff sued the first appellant, John Onyango, claiming that in the year 1978 without any colour of right and without the consent and/or permission and/or approval of the plaintiff, he John Onyango entered and took possession of a parcel of land, of which he was and still is the registered owner, known as Tiriki/Hamisi "A"/635 measuring approximately two and a half acres. The respondent prayed for the eviction of John Onyango from the material parcel of land.

In his defence John Onyango denied that Samson Luwayi, was the registered owner of the parcel of land and put him to strict proof thereof. In the alternative but without prejudice to the denial, John Onyango stated that he bought the material parcel of land from Samson Luwayi in the year 1978 for Shs 5,000 of which sum an amount of Shs 4,500 was paid to Samson Luwayi. John Onyango further stated that he had invested about Shs 10,000 on the land and that the "matter" was still pending before elders in case number 44 of 1982 of Hamisi District Officer's office.

The learned SRM Kakamega heard the suit and found for Samson Luwayi who was the plaintiff. Before

the plaintiff opened his case at the trial, the learned SRM acceded to a request which was made by an application for Javan Bulemi to be made a party to the suit as the second defendant.

John Onyango and Javan Buleni unsuccessfully appealed to the High Court, Kakamega (Aganyanya J) hence the appeal to this court on the grounds that the judge erred in law in disallowing the appellant's objection, that the magistrate erred in trying the case when another suit had been filed in another court relating to the same land, that the magistrate had no powers to hear the case by virtue of The Magistrates' Jurisdiction (Amendment) Act, No 14 of 1981, and that the judge erred in law in upholding the magistrate's decision to dismiss the appellant's case for lack of consent of the land control board of the area. Also that it was an error of law for the judge to agree with the magistrate's decision not to decree specific performance having found that there was part performance. The last ground of appeal is a complaint against the judge's view that Javan Bulemi had no authority to appear before the magistrate.

Before us, at the request of John Onyango, Javan Bulemi spoke for John Onyango after Mr Minishi for the respondent raised no objection. In a careful address, considering that Javan Bulemi is a layman, certainly not an advocate of the High Court, Javan Bulemi argued that the respondent sold the particular parcel of land to John Onyango through him, Javan Bulemi for Shs 5,000, that Shs 4,500 was paid, John Onyango occupied the land in 1978 and has since that time, put up a house on the land, planted cash and food crops, fenced the land by the use of barbed wire but that since 1977 to date, Samson Luwayi has been elusive and has not been willing to go to the land control board with John Onyango. Javan Bulemi mentioned a criminal case against Samson Luwayi allegedly for obtaining money by false pretence which is still pending before the Maseno District court. It was urged that the magistrate misdirected himself in holding that the elders had no jurisdiction, that the magistrate should have held that all cases of trespass had to be heard by elders, that because the sale agreement was not signed by Samson Luwayi, the appellants were sued before the magistrate as trespassers who had partly performed under a contract which became null and void as a result of which the appellants became trespassers with John Onyango as a trespasser *ab initio*. At that stage Javan Bulemi asked the court to give them time to move the High Court to extend the period for applying for consent. John Onyango adopted what Javan Bulemi had presented, and agreed with it all and did not add to it.

Mr Minishi for Samson Luwayi supported the concurrent findings of the trial court and first appellate court and observed that at best, John Onyango was a trespasser but quickly pointed out that the essential issue was lack of consent of the divisional land control board, the property being agricultural land. No application to extend the time had been made and the appellants pressed for specific performance before the trial court.

In reply Javan Bulemi said they were caught up with events and asked for leave to apply to the High Court for time to be extended.

This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: *Abdul v Rubia* 1917/1918 7 EALR 73.

The land the subject-matter of this case is registered in the name of Samson Luwayi. The appellants admitted as much. Since August 1978, John Onyango, the first appellant has been living on the land and cultivating on it. John Onyango entered the land consequent upon an oral agreement between Javan Bulemi and Samson Luwayi the respondent, whereby Javan Bulemi would buy the land for his brother John Onyango. The magistrate held, correctly, that Samson Luwayi must have received the agreed purchase price.

At the trial Javan Bulemi claimed that they had "filed" a counterclaim by which they sought a refund on Shs 100,00 for the development carried out on the land,

"Or otherwise specific performance."

Paragraph 3 of the defence contents that the appellants bought the land and have developed it and

invested about Shs 100,000. The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the divisional land control board. The transaction was therefore void for all purposes section 6(1) of the Land Control Act, cap 302, because the transaction was not excluded by section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate land control board within six months of the making of agreement between Samson Luwayi and Javan Bulemi. No such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise.

The appellants urged before the magistrate and the judge that at the time the suit was filed a dispute on the same land had been referred to a panel of elders to be resolved and that the magistrate could not exercise jurisdiction. The appellants relied on section (1) of the Magistrates' Courts Act, cap 10 which provides,

“9A(1) Notwithstanding the provisions of sections 5 and 9 or of any other written law conferring jurisdiction, but subject to the provisions of this Part, no magistrate's court shall have or exercise jurisdiction and powers in cases of a civil nature, involving –

(a) the beneficial ownership of land;

(b) the division of, or the determination of boundaries to, land, including land held in common;

(c) a claim to occupy or work land;

(d) trespass to land.

(2) An issue relating to any matter set out in paragraphs (a) to (d) of subsection (1) shall be referred to a panel of elders to be resolved.”

The magistrate had before him a claim by the second appellant that he had bought land on behalf of the second appellant from the respondent. The transaction was void for all purposes. The magistrate was duty bound after hearing the evidence to declare the position in law. The suit before the magistrate related to title, was valued at Shs 5,000 and so pursuant to section 159 of the Registered Land Act, which provides

“159. Civil suits and proceedings relating to the title to or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in such land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of part IIIA of the Magistrates' Courts Act, in accordance with that Part,”

the magistrate's jurisdiction was not limited and he could try the case. Besides, in my judgment an agreement that is held to be void for all purposes could not be the basis for a reference to a panel of elders. If a transaction is void for all purposes nothing of it is left that could constitute a case of a civil nature. No complaints of any nature remain to be resolved after a transaction related to agricultural land is held to be void. For that reason, in my opinion, the appellants' case that there was an issue of trespass which could be referred to elders is unsustainable. The words 'void for all purposes' must be interpreted to mean what they say.

Was John Onyango the first appellant a trespasser after the oral agreement of sale of the parcel of land became void?

For my part it matters not whether John Onyango was a trespasser *ab initio* he became a trespasser after he entered the land and caused the respondent to get agitated. The fact of the matter is that Samson Luwayi sued John Onyango because he was aware that no consent had been given for the transaction and

that come what may, John Onyango would be evicted from the parcel of land. John Onyango was not sued for trespass, and it would have been contrary to the pleadings for the magistrate to have held that the civil case before him involved trespass to land.

This court has no jurisdiction to extend the period for making an application for consent as provided in the proviso to section 8(1) of The Land Control Act and in Act No 13 of 1980. Nor to give leave for any such application. One other matter merits mention. The magistrate could if he deemed it proper invoke Order 1 r II of the Civil procedure Rules and authorize Javan Bulemi to conduct the suit. That is the correct step which should have been taken. All the same Javan Bulemi conducted the suit as the second defendant. No prejudice was occasioned to the appellants. The judge did not decide the appeal before him on the basis of the manner in which the trial was conducted.

In the result I reach the conclusion that the magistrate and judge were right. I would dismiss the appeal with costs.

Kneller JA. I agree. And as Hancox JA does, too, the order of the Court is that the appeal is dismissed with costs.

Hancox JA. I have had the advantage of reading in draft the judgment of Nyarangi JA. I entirely agree with his reasoning and his conclusions. The appeal should be dismissed with costs.

Dated at Kisumu this 6th day of May 1986.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR