REPUBLIC OF KENYA

Simiyu v Watambamala

Court of Appeal, at Nairobi

Hancox JA, Nyarangi & Platt Ag JA

Civil Appeal No 34 of 1984

(Appeal from the High Court, Gicheru J, Civil Case No 14 of 1982)

January 31, 1985, Nyarangi Ag JA delivered the following Judgment.

Old Jumba Watambamala the registered owner of a parcel of land known as No East Bukusu/North Kanduyi/76 measuring 31 acres and the father of Maurice, Francis and Fred, respectively the first, second and third respondents died intestate in September, 1970. A year later before the land was transferred to the respondents, the appellants entered into an agreement with the first, second and fourth respondents for the sale of the land whereby the first appellant Cleophas would purchase 16 acres for Kshs 5,440 and the second appellant Biketi was to buy the rest for Kshs 5,250. The appellants paid the agreed purchase prices to the three respondents and after the conclusion of sale agreement, each appellant was given possession of his portion. The 4th respondent is one of the two widows of Jumba Watambamala. On her own admission, she recoiled from the sale agreement because the 1st and 2nd respondents did not use the total of the proceeds of the sale to acquire some other land as was originally planned and she directed that the entire parcel of land be given to Fred the 3rd respondent, her son, who was a minor at the time of the sale agreement. An application by Fred to the divisional Land Control Board for consent to transfer to Miss Opembe so irked the appellants that they instructed Mr Raballa who moved the High Court by way of an originating summons to determine the several matters set out in the originating summons. The High Court (Gicheru M, J as he then was) held that the agreement between the appellants and the 1st, 2nd and 4th respondents is not enforceable as no application for consent was made to the relevant Land Control Board. The appellants have appealed to this court on the grounds that the learned judge erred in holding that the agreement of sale was a controlled transaction requiring consent under the Land Control Act applicable at the time, that the judge erred in deciding that the sale agreement was not beneficial to Fred, erred in not finding that the proposed transfer to Fred was aimed at avoiding transfer of the land to the appellants, also erred in not finding that Fred held the land in trust for the appellants, in not confirming the decision of the elders and in not ordering that the purchase price should be refunded.

Arguing the appeal Mr Raballa took the court through the affidavits sworn by the appellants and urged that there is an enforceable agreement entered into between the first appellant and the respondents and that the several documents which the second appellant signed every time he paid towards the purchase price constitutes an enforceable agreement.

Next, Mr Raballa submitted that Mrs Angara, the mother of the first and second respondents, had a right under customary law to enter into agreement concerning the personal property, being successor of Watambamala the deceased, that the agreement was binding on Fred because part of the purchase price was used on his school education and that the material dealing in the land amounted to a transmission.

Mr Khamati’s contention on behalf of the respondents was that the respondents did not own the land and therefore could not sell it, that Fred was not a party to the sale agreement, that the appellants did not attempt to obtain the consent as required under the Land Control Act before it was amended and that the appeal should be dismissed with costs.

Section 3(3) of the Law of Contract Act, cap 23 provides that no suit shall be brought upon a contract for the disposition in land unless the agreement upon which the suit is founded or some memorandum or note thereof, is in writing and is signed by the party to be charged …. The proviso to the

sub-section doesn't here apply because it was common ground that there was a written sale agreement. However the controlled transaction concerning agricultural land had to satisfy section 6(1) of the Land Control Act, 1967 (The Act) under which each of the specified transactions affecting agricultural land was void for all purposes unless the Land Control Board for the land control area had given its consent to an agreement to be a party to a controlled transaction, three months after the making of the agreement notwithstanding that it was a written agreement. There can be no doubt that the transaction between the parties was a sale agreement as a result of which the appellants paid the purchase price. The respondents were not transmitting the 31 acres by virtue of will or intestacy of the deceased and could not seek in said section 6(3) of the Act. In fact, the respondents were selling the land in the hope that they would be declared heirs under customary law and that subsequently they would be held to have sold that which always before belonging to them. The respondents must have been aware that succession proceedings had been initiated. The mere anticipation that the land would devolve on the respondents didn't confer on them any rights on the land. Furthermore, the anticipation such as there existed was false because by July 24, 1980, Maurice, the first respondent, was opposing the sale by challenging the assumed inheritance of the land by Fred, the third respondent. The appellant could not under the sale have stood in the place of the heirs because under section 40 of the Law of Succession Act cap 160 Watambamala's intestate estate had in the first instance to be divided among the houses according to the number of children in each house, but also adding the two wives surviving him as additional units to the number of children. So the transaction was void by virtue of section 6(1) of the Act.

In his gallant fight for the appellants Mr Raballa cited several authorities starting with the definition of Commissioner of Lands v Hussein [1968] EA 585 on which he submitted that the appellants had spent their money to develop the two plots of land and that it would be inequitable for Fred, the 3rd respondent, whose conduct was deplorable to succeed in the appeal. There is no evidence that by selling his interest to Ojiambo at the appropriate time Fred would be unjustly enriching himself. Besides, the plaintiff in Hussein's case (supra) based his claims not on a statutory provision but on a notice in the official gazette and the case of the defendant was based primarily upon pleas of equitable nature. The decision in Re Hofmann, Hofmann v Hofmann [1972] EA 100 dealt with a dispute on the custody of an infant who had been kidnapped, a matter wholly unrelated to the land dispute. So also with the passage on page 772 in Chaplan v Leslie Frewin (published) and Another [1965] All ER 764, letter G – H in which the learned English judge discusses copyright as a chose in action and refers to a particular contract which could not effect a transfer at law but only in equity. In Jeffries v Jeffries 41 ER 443, the plaintiffs contended that a voluntary settlement although void against a subsequent purchaser was good as between the parties and that person claiming under the will of the settler could not be in a better situation than the settler himself whereas the dependants insisted that the court would not interfere for the purpose of giving effect to a voluntary settlement. Clearly the facts of this appeal have nothing in common with those in Jeffries v Jeffries. In the action in Brown v Westminster Bank Ltd [1964] 2 Lloyd's Reports 197, the plaintiff sued the dependant bank with whose branch she maintained a current account for a declaration that the bank wrongly debited to her account a number of cheques and also claimed a sum of money being the amount presented by the face value of the cheques allegedly wrongly debited. It is difficult, to say the least, to understand the relevance of the case to the appeal. In West County Cleaners (Falmouth) v Saly [1966] l WLR 1485, the landlord of certain premises let them under a lease for a term of 14 years to tenants who covenanted to paint, paper and whitewash at least once in every third year of the term but in breach of the clause the tenants did not paint the ceiling. At p 1489, the judgment deals with the points whether there was a waiver or estoppel to be referred and if the right to ask for a renewed lease had been complied with. All that has nothing helpful to the appellants. Finally, in Greenwood v Martins Bank Ltd 1933 AC 51 the sole question was whether in the circumstances of that case the respondents were entitled to set up an estoppel. Here, the appellants had to obtain consent for the controlled transaction. They did not and so the agreement was void for all purposes including attempting to set up estoppel. The appeal was not arguable and is unmeritorious. The appellants' remedy is an action for damages provided they ware not timebarred (Limitation of Actions Act cap 22) see also Chemelili Sisal Estates Ltd v Makongi Ltd, [1967] EA p 166. Under section 7 of the Act the appellants have a right of recovery of the purchase money.

The appeal should be dismissed with costs.

Hancox JA. In my judgment the agreement dated October 9, 1971, whereby the first and second respondents agreed to sell sixteen acres of land at East Bukusu/North Kanduyi/76 to the first respondent, was fairly and squarely caught by the provisions of the Land Control Act, cap 302, as it was before it was amended in 1980. The same applies to the less clear cut agreement to sell the remaining fifteen acres to the second appellant, in which the fourth respondent, the second wife of the late Juma Watambamala, also joined as a vendor. The sale of the land was controlled transaction within the meaning of section 6(1)(a) of the Act, as it then was, and an agreement to be a party to it was, under subsection 92)(a), void for all purposes unless application for Land Control Board consent had been made within three months of each transaction. It is common ground that no such application was made. Moreover, as Gicheru, J appointed out in his admirable judgment, none of the respondents had title to the land at that time, which the district magistrate at Bungoma, on a subsequent application under section 120 of the Registered Land Act, cap 300, ordered should devolve on the third respondent (who was under age at the material time) in succession case No 31 of 1980.

It was argued by Mr Raballa, for the appellants, that some kind of equitable trust arose in favour of the appellants by virtue of the decisions in Jeffreys v Jeffreys, [1841] 41 ER 443 and Chaplin v Leslie Frewin Ltd [1965] 3 All ER 764, per Danckwerts, LJ, at p 773, because there was some suggestion that the purchase money had been used for the third respondent's education.However, neither of those decisions turned on a statutory prohibition of the agreement in question, and the latter case related to a contract with an infant, of which he was held to have received the benefit. Neither do I agree with Mr Raballa's submission that there was a transmission of the land, so as to take the transaction outside the statute by virtue of subsection (3) of section 6.

The appellant's remedy, subject to the laws of limitation, was an action for damages, coupled with the right of recovery of the purchase money under section 7 of the Act of 1967, which has been virtually reproduced in the amended Act of 1981. No such relief was specifically claimed in the originating summons decided by Gicheru, J.

I, accordingly, agree with Nyarangi Ag JA, that the appeal should be dismissed with costs. As Platt Ag JA, also agrees, it is so ordered.

Platt Ag JA. I agree that the appeal should be dismissed on any view of the transaction put forward. If the sellers were intending to sell their present rights in land, to which they considered themselves after the death of their father intestate in 1970, then that agreement was void because they could not sell what they did not have. They had to be declared heirs of their father under the process permitted by section 120 of the Registered Land Act (cap 300). In the event, only the third defendant was declared as heir in 1980 at customary law as it stood at the time of death. He had been a minor at the time of the transactions in 1971. Whether a void agreement, attracts consent under the Land Control Act (cap 302) I leave open, although there must be doubt on that point. If it does, the agreement was further void for lack of consent.

If on the other hand, they thought that they were selling a spes, the agreements might amount to an agreement to sell land in the future, in the event that they were declared heirs. It would not then be the sale of a present interest in land; but according to Mr Raballa the buyers were to stand in place of the sellers and claim the inheritance of the sellers. Thus by transmission, the transaction would come under section 6(3) of the Land Control Act, and escape the necessity of Land Control Board consent to the sale. Such an idea would be void as against public policy. The declaration of heirs under customary law in section 120 of the Registered Land Act (cap 300) did not permit purchasers to be subrogated. Nor does transmission from intestate to heir encompass a purchaser. It is because transmission is precisely circumscribed within the family under customary law, that the Land Control Act is not applied. This suggestion would not allow evasion of the need for consent under the latter Act.

If however, it was merely an agreement for a sale in future on condition that the sellers were declared heirs, that might constitute a "dealing" with land under the Land Control Act, section 6(1) and still require consent. In fact the condition was never fulfilled, and the buyers got nothing on their gamble in buying the option to acquire the land, if the condition should be fulfilled.

It was suggested that the Land Control Act worked hardship, which should be relieved against. I would have thought that the way these sellers operated, selling land to which they had no right, over the head of their minor brother, illustrated the need for control. The buyers were in no better position either. At any rate, the originating summons was brought under rule 1(f) of Order XXXVI of the Civil Procedure Rules. The learned judge was quite right in not approving these contracts. It is complained that he ought to have ordered the refund of the purchase money under section 7 of the Land Control Act. It is obvious that the learned judge could do no such thing on the summons before him. The appellants should have sought redress on other proceedings, and whether damages, or a refund under section 7 as a debt, or any other remedy, is open to them now after the time that has elapsed since 1971, I leave the others to decide. The buyers took several risks which did not pay off, and they must accordingly suffer the loss if they cannot recover. In the circumstances of this case no trust could arise because the parties failed to comply with the statutory law applicable to them.