



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 95 OF 2016

EDWARD HUMPHREY KIROO KANJA.....APPELLANT

VERSUS

SAMUEL NJOROGE KIROO.....RESPONDENT

(Being an appeal from the Judgment of Mr. E. Michieka AG. Principal Magistrate

in Kikuyu Law Courts in SPMCC No. 193 of 2008 dated 21st January 2014.)

JUDGEMENT

1. This appeal arises out of the judgment of Hon. E. Michieka (Mr) Ag Principal Magistrate delivered on 21st January 2014. The Hon. Learned Magistrate made the following orders:-

“That the plaintiff has not proved this case on a balance of probability or at all as against the defendant and do hereby proceed to dismiss the suit in its entirety with costs to the defendant”.

2. The appellant being dissatisfied with the decision filed an appeal to this court on the following grounds:-

1. That the learned magistrate erred in law and in fact in failing to find that the respondent had obtained consent to transfer from the Land Control Board Kikuyu in favour of the Appellant and that the respondent only needed to execute transfer in favour of the appellant for transfer of ¼ acre in LR No. Muguga/Kahuhon/726.

2. That the learned magistrate erred in law and in fact in failing to correctly evaluate the evidence the respondent’s witness number 2 and failing to find that he was not an impartial witness.

3. That the learned magistrate erred in law and in fact in failing to consider the cause of action was an action relating to an interest in land and not contract and that it had commenced in 2008 and therefore within the limitation period as provided in the Limitation of Actions Act (cap 22).

4. That the learned magistrate erred in law and in fact in failing to consider the provisions of Section 3(3) of the Law of Contract Act before its amendment and find that the appellant had in fact taken possession of the suit land.

5. That the learned magistrate erred in law and in fact in not finding that the respondent’s claim for payment of additional consideration for the suit land was unfounded, unmeritorious and lacking in substance and only intended to defeat the rights of the appellant to the suit land.

6. That the learned magistrate erred in law and in fact in not considering the rights of the appellant to the suit land having lived and possessed it for over 12 years.

7. That the learned magistrate erred in law and in fact in failing to correctly evaluate the evidence on record and hence misdirected himself in all his findings relating to the true state of fact in the matter.

3. The appellant prays that:-

(a) The appeal be allowed and the respondent be compelled to transfer ¼ acre in LR No. Muguga/Kahuho/726 in favour of the appellant or in the alternative the registrar of this honourable court execute transfer documents in place of the respondent so that the appellant can be registered as holder of ¼ acre in LR No. Muguga/Kahoho/726.

(b) Costs of the suit be provided for.

4. On the 31st July 2017, the court directed that parties do file written submissions..

The Appellant's submissions

5. Section 6 of the Land Control Act (Cap 302) provides that any sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area is void for all purposes unless the Land Control Board for the control area or division in which the land is situated has given its consent in respect of that transaction.

6. The fact that the respondent obtained the necessary consent required under the Land Control Act (Cap 302) means that the transaction between him and the appellant was valid. He has put forward the cases of **Kariuki vs Kariuki [1983] KLR 225**, **Wamukota vs Donati [1987] KLR 280**, **Harambee Cooperative Savings and Credit Society vs Mukinye Enterprises Ltd [1983] KLR 611**.

7. In the lower court, the consent from the Land Control Board was not contested. The fact that the appellant had been in continuous occupation of the suit land since 1992 was also not disputed. The consent from the Land Control Board, Kikuyu therefore validated the sale of the suit land to the Appellant and the claim by the respondent that he had not received full payment was an afterthought and only meant to defeat the rights of the appellant.

8. It was therefore improper for the lower court to dismiss the appellant's suit when there was sufficient evidence to justify the sale, there was continuous and uninterrupted occupation by the appellant which then entitled the respondent to effect the transfer to him which he had ignored to do.

9. The learned magistrate failed to appreciate the fact that the respondent's second witness, Paul Githinji Kiriro, a brother to the appellant and respondent was biased in his testimony. He told the court that the suit property was sold for Kshs.400,000 and that they only paid Kshs.100,000/-. The said witness upon cross examination stated that they had differences with the appellant, which had landed them to Kikuyu Police Station. He also failed to appreciate the fact that the respondent could not have proceeded to obtain the Land Control Board Consent when he had not been fully paid.

10. The learned magistrate erred in law and in fact in considering the dispute between the appellant and respondent as one founded on contract, instead, failing to consider the cause of action as one founded on an interest in land and commenced in 2008. The dispute over ownership arose when the suit was filed. The respondent's right to the suit land had long been extinguished, when he applied for consent to transfer from the Land Control Board, Kikuyu.

11. Section 3(7) of the Law of Contract Act, excludes the application of Section 3(3) of the Act for all contracts executed before the commencement of the Act on 1st June 2003. The appellant had entered into an oral agreement in 1992 which was therefore exempted from the application of Section 3(3) of the Law of Contract. The appellant took possession in part performance of the oral contract and he continued to be in possession. He is in possession to date.

12. The appellant and the respondent being brothers entered into the sale agreement based on trust and upon the respondent receiving payment, applied for consent from the Land Control Board, Kikuyu. The claim for additional consideration is not honest. The appellant has lived on the suit land for an uninterrupted period of over 12 years. He had acquired rights through adverse possession. The learned trial magistrate failed to evaluate all the evidence before him and therefore did not make a reasoned decision. The appellant prays that the appeal be allowed.

The Respondent's submissions

13. The learned trial magistrate correctly found that the Land Control Board consent did not and could not confer any rights or title over the suit land to the appellant. The respondent never executed the Land Control Board consent or the transfer because the appellant breached the terms of any agreement that was there between the parties. The respondent did not transfer his legal and proprietary rights to the appellant and the land control board consent had no effect.

14. It is not factual for the appellant to state that the cause of action was not related to contract. The parties had the intention of entering into a contract of sale and disposition of land. The learned trial magistrate correctly interpreted the provisions of Section 3(3) of the Land Control Act. The appellant did not adduce evidence to demonstrate when he and the respondent entered into the contract. The provisions of Section 3(7) of the Land Control act are not applicable. The appellant bore the burden to demonstrate to the court his part performance of the contract by being in possession and doing something else in further performance of the contract.

15. The appellant filed the suit fourteen (14) years after the commencement of the cause of action. The suit was time barred pursuant to Section 4(a), 7, of the Limitation of Actions Act. He has put forward the case of **Kokal Konor vs Emily Naipanoi Kasaine & 2 Others [2014] eKLR**.

16. The learned trial magistrate in his judgment made reference to and after considering evidence as adduced by both parties and their respective witnesses. The appellant always carried the burden of proof of the facts and the evidence he sought to rely upon in support of his case. The trial court had the duty to decide the case on a balance of probability and properly evaluate the evidence and the law before it. He

has put forward the case of **Philemon Abongo Arodi vs Standard Ltd & Another [2017] eKLR**. The appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached should stand. However such jurisdiction should be exercised with caution. He prays that the appeal be dismissed with costs to the respondent.

17. This being the first appeal, it is the duty of the court to re-evaluate the evidence tendered before the trial court. In the case of **Nebart Njeri Munyi vs Nicholas Muriithi Zakaria [2015] eKLR** the court cited the case of **Ephantus Mwangi vs Duncan Mwangi Wambugu [1982-88] 1KAR 278** where it held that:-

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding and an appellate court is not bound to accept the trial judges finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

18. The issues for determination are:-

(i) Whether the learned magistrate erred in failing to consider that the cause of action was an action in land, which commenced in 2008 and therefore within the limitation period as provided for in the Limitation of Actions Act.

(ii) Whether the learned magistrate erred in law and in fact in failing to consider the provisions of Section 3(3) of the Land Control Act before its amendment.

(iii) Whether the appellant had in fact taken possession of the suit land.

(iv) Whether the respondent’s claim for additional consideration for the suit land is unfounded, unmeritorious and lacking in substance.

(v) What is the effect of the consent from the Land Control Board.

(vi) Who should bear costs?

19. The appellant told the trial court that he bought the suit property jointly with his brother, Paul Githinji Kiriro. The whole parcel of land is ½ an acre. Each was to get a quarter of an acre. That they went to the land control board and got consent. The application for consent and the consent produced as exhibit P1 and P2 respectively. He told the court that they took possession and started cultivating it. He further told the trial court:-

“In 2008 a company Telkom (K) Ltd came and erected a mast. Letter from Erickson /Telkom P exhibit 4. It was a request for a lease for my shamba. My land is No. 727. The mast occupied 727 and 726 which is the shamba we bought from the defendant. Me and Paul on our own divided ¼, ¼ each though we have no title. When we went to Land Control Board we had fully paid and had no arrears whatsoever. When the mast was built, the defendant went to Telkom and said the mast was on his land. I took my documents of Land Control Board to Telkom to prove the property is mine. Paul and I bought the land. We have no disputes. I pray that the court removes the land and transfers the land to us so that we can divide it and other prayers as in the plaint. We gave Njoroge defendant the full payment”.

The appellant’s witness, Edward Kahiru Nyanga, a retired Chief Muguga location confirmed that he was the area chief then. That he was requested by the respondent to represent him in the land control board. The respondent was selling land to the appellant and Paul Githinji. He confirmed that he attended the land control board and consent was given. He also confirmed that at the time there was no issue of non payment of the purchase price.

20. The respondent then told the trial court:

“I am a businessman in Nairobi and Nakuru. I know the plaintiff. He is Edward Kiriro my younger brother. I have two brothers who I sold a piece of land for Kshs.400,000. They paid 100,000 at 50,000 each. Edward and Pual Kiriro. We did not write any agreement. I also wrote to the Land Control Board. Parcel No. Muguga/Kahuho/726. I told the land control board, if they pay the balance I will transfer it. They did not pay so no transfer. A telephone company came to put up a mast, Edward claimed the land was his. I got to know of this from my elder brother. The plaintiff said 727 is his but the mast is on 726 which is mine. The offer was for 727. 727 belongs to Edward. The mast was erected on 726 and not on 727. The mast was erected. I asked him why and he said it was his that he bought it from me. Application for consent by both Paul and Edward. One has signed and the other has not signed. It appears Paul did not sign. Now I see it has been signed by them both. This was done in 1993. They should have paid me then I transfer. I have a title deed for that property-D exhibit1., certificate of search dated 15th September 2008 copy of search D Exhibit 2.....”

21. From the above evidence, there is no doubt that the agreement between the appellant, his brother Paul and the respondent was oral. They are all brothers. The appellant on one hand says the purchase price was Kshs.100,000 which they paid in full while the respondent claims it was Kshs.400,000 of which only Kshs.100,000 was paid. In the absence of a written sale agreement, it is the appellant’s word against the respondents.

22. It is the appellant’s case that he took possession in 1992 and started cultivating and utilizing it. The respondent started claiming the suit

property was his after Telkom Kenya Limited shown interest in putting up a base transceiver station on the suit land. This is when the appellant filed a suit in Kikuyu Law Courts seeking to compel the respondent to effect transfer in his favour.

23. I agree with the appellant's submissions that the cause of action arose in 2008 when the suit was filed. The learned trial magistrate therefore erred when he failed to consider that the cause of action was one founded in an interest in land. I find that the appellant's claim was not time barred.

24. Section 3(3) of the Law of Contracts Act (Cap 23 Laws of Kenya) provides that no suit shall be brought upon a contract for disposition of an interest in land unless the contract is in writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act however excludes the application of section 3(3) of the Act for all contracts executed before the amendment of the Act on 1st June 2003. It should be noted that the parties herein entered into an oral agreement in 1992 hence exempted by the application of Section 3(3) of the Laws of Contract Act. Section 38(2) of the Land Act, 2012 gives the same position.

25. It is not in dispute that the appellant took possession in part performance of the oral contract. He continued to be in possession and has been in possession to date. I find that the oral agreement between the appellant and the respondent is binding. The respondent claims that he was not paid the full purchase price. That he was only paid Kshs.100,000 out of the agreed Kshs.400,000. In the absence of a written agreement, it would be the appellant word against the respondent's. This was an agreement between brothers therefore based on trust. Paul Githinji sided with the respondent, in the trial court by stating that the balance of Kshs.300,000 was not paid. When cross examined by the appellant's counsel he admitted that he and the appellant had disagreed and have disputes at the Kikuyu police station. His evidence ought to have been treated with a lot of caution by the trial court. This witness had the opportunity to tell the truth but was blinded by his disagreement with the appellant. I find that there is no basis from which the respondent could ask for additional consideration. The fact that the appellant was in possession was not challenged.

26. To show that the respondent had been paid the full purchase price, he went ahead to apply for consent from the land control board Kikuyu and the said consent was granted. He claims the consent was subject to payment of the balance. There was nothing to prove this. The application for consent is in respect of LR No. Muguga/Kahuho/726. The consent to transfer was granted in January 1994. I have seen the said forms. There is nothing to show that the consent was subject to payment of the balance. The respondent would not have applied for consent if he had been paid full purchase price. It has been stated before that as long as there is consideration, a contract is not invalidated by reason of insufficient consideration. There is no doubt in the instant case that the respondent intended to sell the suit property to the applicant and Paul Githinji who are his brothers. There is nothing to show that he had changed his mind. It is only when the Telkom Kenya Limited, had put up the mast on the suit property that he appeared to change his mind. The respondent's claim that the appellant was cultivating the suit property with his permission does not hold any water.

27. In the case of **Wamukota vs Donati [1987] KLR 280** it was held that:-

“Although the respondent had purchased and paid for the land and was correctly in occupation the contract of sale was not in writing as required by the law of contracts Act (Cap 23) Section 3 and neither was it consented by the land control board as per the Land Control Act.”

The court went further to state:-

“The sale of agricultural land is void for all purposes unless the land control board has given its consent to the sale”.

In the instant suit the consent from the land control board Kikuyu was sought and it was granted.

28. Also in the case of **Joseph Boro Ngera vs Wanjiru Kamau Kaime & Others CA No. 32 of 2005 (Nakuru)** the court held that the High court had properly exercised its jurisdiction under section 8 of the Land Control Act when it declined to extend time for applying for consent of the land control board.”

The above provision underscores the importance of obtaining consent from the land control board. In the instant suit the necessary consent was obtained in good time.

29. I therefore find that the learned trial magistrate failed to correctly evaluate all the evidence before him and arrived at a wrong conclusion. I find merit in this appeal and the same is allowed. I hereby set aside the judgment and decree of the lower court dated 21st January 2014 and substitute with an order allowing the appellant's suit with costs. The appellant shall also have costs of this appeal. It is so ordered.

Dated, signed and delivered in Nairobi on this 17th day of October 2019.

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Appellant

Ms Kamemia for Ms Kisa for the Respondent

