



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 13 OF 2019

JULIUS NJUE MUKANGU.....APPELLANT

VERSUS

AUGUSTINO KINYUA NJIRU.....1ST RESPONDENT

JANE WEGANDU.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. R.O.

Oigara (PM) delivered on 16.12.2015 in Embu CMCC No. 28 of 2015)

JUDGEMENT

1. This appeal arises from the ruling and order of the Hon. R.O. Oigara (PM) dated 16th December 2015 in *Embu CMCC No. 28 of 2015*. By the said ruling the court dismissed the Appellant's notice of preliminary objection dated 20th August 2015 seeking the dismissal or striking out of the Respondent's suit for alleged violation of various provisions of the law under the **Law of Contract Act (Cap. 23), the Land Control Act (Cap. 302) and the Limitation of Actions Act (Cap. 22)**.

2. The material on record indicates that the said preliminary objection was canvassed by the parties through written submissions. Although the Appellant had framed about 5 points of preliminary objection in his notice of 20th August 2015, he argued the following three main points only:

- a) *Whether the suit was incompetent by virtue of section 3(3)(b) of the Law of Contract Act (Cap. 23).*
- b) *Whether the suit was incompetent by virtue of sections 6(1) and 8(1) of the Land Control Act (Cap. 302).*
- c) *Whether the suit was incompetent by virtue of sections 4(1)(a) and 4(2) of the Limitation of Actions Act (Cap. 22).*

3. By a ruling dated 16th December 2015 the court overruled the Appellant's preliminary objections in their entirety. On the first point, the trial court held that although the sale agreement between the parties was not attested as per the requirements of **section 3(3) of the Law of Contract Act**, the Respondent's suit was not for enforcement of the sale agreement but a claim for a refund of the purchase price. On the 2nd issue, the trial court held that even though the contract between the parties may have become void for want of consent of the Land Control Board, the suit was not for specific performance but a refund of the purchase price which was permitted by law. On the 3rd issue, the trial court held that since the Respondent had obtained leave of court to file suit out of time, the said leave could not be challenged summarily and before trial of the action.

4. Aggrieved by the said ruling, the Appellant filed a memorandum of appeal before this court raising the following twelve (12) grounds of appeal:

- i. *The learned trial magistrate erred in law and fact by finding that section 3(3)(b) of the Law of Contract Act, Cap 23 was inapplicable as the suit was not for specific performance.*
- ii. *The learned trial magistrate misconducted himself by disregarding the authorities of *Jane Catherine K. Karani V Daniel Mureithi Wachira [2014] eKLR* and *Charles Mwirigi Miriti V Thananga Tea Growers Sacco Ltd & Another [2014] eKLR* which were binding on him.*
- iii. *The learned trial magistrate erred in law by finding that the Respondent was entitled to recover consideration under section 6(1) and 8(1) of the Land Control Act, Cap. 302.*

iv. *The learned trial magistrate misconducted himself by disregarding the authorities of David Sironga Ole Tukai V Francis arap Muge & 2 Others [2014] eKLR and Koyumkei Multipurpose Cooperative Society Limited and Others V Rael Chepngetich Koech [2014] eKLR which were binding on him.*

v. *The learned trial magistrate erred in law and fact by failing to find that the sale agreement was illegal and enforceable by virtue of section 7 and 22 of the Land Control Act.*

vi. *The learned trial magistrate misconducted himself by disregarding the authorities of David Sironga Ole Tukai V Francis arap Muge & 2 others [2014] and C-Hear (Kenya) Limited V Liquid Telecommunications Kenya Limited [2014] eKLR which were binding on him.*

vii. *The learned trial magistrate erred in law and fact by failing to find that the suit was barred by sections 4(1)(a) and (2) of the Limitation of Actions Act.*

viii. *The learned trial magistrate erred in law by failing to find that section 27 of the Limitation of Actions Act does not apply to an agreement for sale of land.*

ix. *The learned trial magistrate misconducted himself by disregarding the authority of Rosemary Wanjiru Kungu V Elijah Macharia Githinji & Another [2014] eKLR which was binding on him.*

x. *The learned trial magistrate misconducted himself and erred in law by utterly disregarding the Appellant's submissions.*

xi. *The learned trial magistrate misconducted himself and abrogated the Constitution by denying the Appellant the right to the benefit of the law, the right to fair hearing protected by Articles 25, 27(1), 47(1), 48 and 50(1) of the Constitution.*

xii. *The ruling in the circumstances of the case was such that a manifest travesty of justice occurred therein. (sic)*

5. When the appeal was mentioned for directions on 10th July 2019 the Appellant was directed to file and serve a record of appeal within 30 days in default of which the appeal would stand struck out without further order. The court further directed that the said appeal be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions.

6. The court record indicates that by the time of preparation of this judgement, the Appellant had not filed the record of appeal. None of the parties had also filed written submissions. The court is of the opinion that the Appellant having defaulted in filing his record of appeal within the stipulated time or at all, his appeal stood struck out automatically by virtue of the default clause of 10 July 2019. There is, therefore, no competent appeal before this court for determination.

7. Upon perusal of the court file, the court has come across what purports to be a certificate of delay dated 30th September 2019 issued by the Deputy Registrar. The certificate states that there was delay in supplying the Appellant with certified copies of the proceedings due to workload at the typing pool. The certificate does not indicate when the proceedings were ready for collection. So, assuming the proceedings were supplied on 30th September 2019, how come that the Appellant was still unable to file the record of Appeal for more than one and a half months thereafter? There was no explanation on record for the Appellant's default even after copies of the proceedings were supplied.

8. The court has closely examined the material on record against the certificate of delay dated 30th September 2019. The court has noted from the record that typed copies of the proceedings herein were certified on 28th December 2018 but collected on 30th September 2019 by one Jared Mugendi on behalf of the Appellant's advocates. So, if certified proceedings were ready as far back as 28th December 2018, why didn't the Appellant's advocates collect them timeously? Assuming that they were unaware that the proceedings were ready for collection, why didn't they check with the court registry upon directions being given on 10th July 2019?

9. The court is of the opinion that the Appellant has not been diligent in the prosecution of the appeal. The record indicates that the Appeal was admitted on 16th January 2019 whereby the court directed that the record of appeal be filed and served within 21 days. The record indicates that the Appellant did not take any steps towards filing the record of appeal or taking directions for several months. The matter was eventually fixed for mention for directions by the court of its own motion on 9th May 2019.

10. In case the court is wrong on the application of the default clause, the court shall proceed to consider the grounds of appeal raised by the Appellant. The court notes that although there were only 3 issues for determination by the trial court, the Appellant has framed twelve (12) issues from them. Most of the issues have been split and duplicated in the memorandum of appeal. The court is, therefore, of the opinion that the following are the 3 main issues which arise for determination in this appeal:

a) *Whether the trial court erred in law in holding that the sale agreement between the parties did not contravene section 3(3) of the Law of Contract Act (Cap. 23).*

b) *Whether the trial court erred in law in holding that the Respondent's suit was not incompetent by virtue of sections 6(1) and 8(1) of the Land Control Act (Cap. 302).*

c) *Whether the trial court erred in law in holding that the ex parte leave granting extension of time to file suit out of time could not be challenged by way of a preliminary objection.*

11. The court has fully considered the material on record on the first issue for determination. The material on record indicates that the Respondent's suit before the trial court sought the following reliefs:

a) *The refund of Ksh. 120,000/- inclusive of 50% default penalty as stipulated in clause (6) of the sale agreement dated 2nd February 2006.*

b) *Interest on (i) above from 2nd February 2006 until full payment.*

c) *Costs of the suit.*

d) *Interest at court rates.*

12. The plaint before the trial court indicates that the Respondent sought a refund of the purchase price he had paid for the purchase of ½ acre out of the Appellant's Title No. *Gaturi/Nembure/4924* which fell through for lack of consent of the Land Control Board. The Respondent laid blame upon the Appellant for having failed to obtain the consent of the board and for failing to refund the purchase price and to pay the agreed liquidated damages.

13. The Appellant objected to the Respondent's suit on the ground that the sale agreement between the parties had not been properly attested as required by **section 3(3) of the Law of Contract Act** which stipulates as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) The contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

14. The Appellant relied on the cases of **Jane Catherine K. Karani V Daniel Mureithi Wachira [2014] eKLR** and **Charles Mwirigi Miriti V Thananga Tea Growers Sacco Ltd & Another [2014] eKLR**. In both cases, the Court of Appeal of Kenya held that a contract which did not meet the formalities as to attestation as required under **section 3(3) of the Law of Contract Act** was not enforceable.

15. The real question in this matter is whether or not the Respondent was seeking to enforce the sale agreement dated 2nd February 2006 by filing the suit before the Magistrates' court. The trial court considered this issue and came to the conclusion that the Respondent's suit was not seeking enforcement of the agreement but merely seeking a refund of the purchase price after the transaction between the parties fell through.

16. So, could it be said that the trial magistrate misdirected himself in law in holding that the suit was not for enforcement of the sale agreement but merely a suit for recovery of the consideration paid under the sale agreement which was no longer enforceable? This court's own evaluation of that question of law leads to the conclusion that there was no error or misdirection on the part of the trial court. The Respondent had clearly recognized that he could no longer enjoy the benefits of the sale agreement dated 2nd February 2006 since it had become void for lack of consent of the Land Control Board. All the Respondent wanted was to recover the purchase price he had paid to the Appellant as there was a total failure of consideration. That is a totally different cause of action from enforcement of the sale agreement.

17. The 2nd issue relates to the applicability of **sections 6(1) and 8(1) of the Land Control Act**. **Section 6(1)** of the said Act stipulates as follows:

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

18. It was common ground before the trial court that no consent of the Land Control Board was obtained by either party for sub-division and

transfer of any part of the suit property. It was also common ground that the sale agreement of 2nd February 2006 became void for want of such consent. The Appellant's objection to the suit was that it was incompetent for lack of consent of the Land Control Board. He relied on the case of **David Sironga Ole Tukai Vs Francis Arap Muge & 2 Others [2014] eKLR** (hereafter *Ole Tukai Case*) where the Court of Appeal of Kenya held that all transactions involving agricultural land would be void in the absence of the consent of the Land Control Board sanctioning such transactions. What the Appellant failed to point out before the trial court was that even the Court of Appeal in the said case specifically recognized the right of the purchaser in a void transaction to recover the purchase price as a debt. Indeed, that is a statutory right which is specifically provided for in **section 7 of the Land Control Act**.

19. The court has considered the material on record and the applicable statutory and case law including the **Ole Tukai Case**. The court is also aware that in the more recent case of **Willy Kimutai Kitilit Vs Michael Kibet Eldoret Civil Appeal No. 51 of 2015 [2018] eKLR** (hereafter *Willy Kimutai Case*) the Court of Appeal held that in addition to ordering a refund of the purchase price, the court may upon application of the doctrines of equity, award damages and where damages are not adequate it may grant the equitable relief of specific performance. The court, therefore, finds no fault with the trial court's holding that the Respondent could pursue a refund of the purchase price paid under a void agreement for sale.

20. The 3rd issue is whether the trial court erred in holding that the *ex parte* leave to file suit out of time could not be challenged by way of a preliminary objection and that it could only be challenged at the trial. It has been held that it would be improper to apply to set aside such *ex parte* leave before the trial of the action. See **Mary Wambui Kabugu V Kenya Bus Services [1997] eKLR**. The affected Defendant may, however, challenge such leave at the trial of the action by showing that such leave was not warranted or deserved. A *fortiori* such leave cannot be challenged by way of preliminary objection before the trial of the action since it would be contrary to the policy and intention of the **Limitation of Actions Act (Cap. 22)**.

21. In the case of **Mary Wambui Kabugu (supra) A.B. Shah J.A.** (as he then was) held as follows:

In a situation such as I have outlined the defendant only becomes aware of the order extending time when he is served with the summons, plaint and the order extending time. There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In my humble view the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts.

I am not alone in what I say. In the case of Yunes K. Oruta & Another v. Samwel Mose Nyamato, (Civil Appeal No. 96 of 1984), unreported (Nyarangi, Platt & Gachuhi JJ.A.) it was held that the issue of challenge to the granting of leave to file suit out of time can only arise at the trial. Gachuhi JA, in the leading judgment in ORUTA case said:

"It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the limitation of Actions Act particularly where leave to file an action against the defendant has been granted ex-parte."

Gachuhi JA, in the ORUTA case relied on the decisions of the majority judgments of the Court of Appeal in England in the case of Cozen V. North Devon Hospital Management Committee & Another (1966) 2 All E.R. 799. In the COZEN case it was held:

"Although it was a general principle in regard to ex-parte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intentions of the Limitation Act 1963 to allow a defendant to apply, before the trial of the action, to set aside an ex-parte order obtained under section 2(1) giving leave for the purpose of section 1(1)(a)".

It must be remembered that sections 1 and 2 of the English Limitation Act of 1963 are in pari materia with sections 27 and 28 of the Act.

Gachuhi J.A said further in the ORUTA case:

"The respondent having obtained leave to file action as require by the law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order ex-parte will be rendered nugatory."

Platt J.A said in ORUTA case:

"I agree that this court should respectfully adopt the reasoning in Cozen v. North Devon Hospital Management Committee (1966) 2 All E.R. 799. It follows that the defendant can only challenge the extension of time in trial itself and not by a preliminary application. This is an exception to the general rule that the parties affected by an ex-parte order can seek to set it aside under the principles of natural justice."

22. The upshot of the foregoing is that the court finds no merit in the grounds of appeal raised by the Appellant. Consequently, the appeal is hereby dismissed in its entirety with costs to the Respondent.

23. It is so decided.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28TH DAY OF NOVEMBER, 2019

In the presence of Mr. Eddie Njiru for the Respondents and the Appellant present in person.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

28.11.19