



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT MERU

ELC NO. 14 OF 2010

M'MUNGANIA MANIU.....APPELLANT

VERSUS

JULIUS KIRIMA MURITHI.....RESPONDENT

JUDGMENT

1. The appellant was the 2nd defendant while the respondent was the plaintiff in the lower court case.
2. The plaintiff's case in the lower court was that he had entered into an agreement with 1st defendant Paul Kirima on 14.03.1995, where by the latter was to sell to the plaintiff the land parcel No. KIIRUA/NKANDO/1031 measuring 2 acres or thereabout.
3. The price was Kshs.68,000 which plaintiff allegedly paid. He then took over the land and started to cultivate. However, 1st defendant declined to transfer the land to him.
4. Sometime in 2007 plaintiff learnt that 1st defendant had transferred the land to 2nd defendant. He took the step of filing the CMCC No. 1 of 2008 as against the two defendants.
5. Plaintiff's prayers before the lower court were for:
 - a. Specific performance for the sale agreement dated 14.3.1995 and in the alternative a refund of the consideration price.
 - b. An order for cancellation of the 2nd defendant as the proprietor of the suit land
 - c. Payment of liquidated damages
 - d. Costs and interests.
6. Defendants denied the plaintiffs claim. 1st defendant denied that he ever entered into any agreement with plaintiff.
7. Defendants further averred that plaintiff's suit lacked any reasonable cause of action was frivolous without merit was bad in law, time barred and that the suit offends the express provisions of the law with regard to consent to institute the suit.
8. Vide a judgment delivered on 21.1.2010, plaintiff's claim was allowed in the following terms:
 - i. That registration of the 2nd defendant's name as owner of the suit land No. Kiirua/Nkando/1031 be cancelled forth with and the 1st defendant do forthwith proceed to sign transfer documents for the land to be transferred to the name of the plaintiff.
 - ii. That in the alternative the 1st defendant do forthwith refund the plaintiff a sum of Kshs.68,000/= together with interest thereon at court rates from 14th March 1995 up to the date of payment.
 - iii. That the 2nd defendant be at liberty to counter claim against the 1st defendant.
 - iv. That the 1st defendant do pay the costs of this suit to both the plaintiff and the 2nd defendant.
9. 2nd defendant was dissatisfied with the judgment hence this appeal. Four grounds have been set forth in the memorandum of appeal filed

on 19.2.2010 and they are;

- i. That the learned Senior Resident magistrate erred in law and in facts in failing to have regard to the appellants defence and submission that the suit was time barred.
- ii. That the learned Senior Resident Magistrate erred in law and in facts by failing to have regard to the appellants defence and submissions that the respondent's suit was a nonstarter since the consent from the adjudication officer was not filed with the plaint.
- iii. That the learned Senior Resident Magistrate erred in law and in facts by ordering cancellation of the title and transfer of the title to the respondent when no such prayer was sought.
- iv. That the learned Senior Resident Magistrate erred in law and in facts by concluding that the respondent was in occupation of the material parcel of land without regard to the appellants evidence.

10. Pursuant to directions given on 25.9.2017 the appeal was to be canvassed by way of written submissions. The said submissions have been duly filed.

11. This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, and has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

12. Plaintiff's testimony before the lower court was that he bought the suit land from the 1st defendant on 14.3.1995 vide a land sale agreement which he produced as PExh 1. He paid Shs.68,000 and took over the possession of the land. One Jerald Mworira Inoti was a witness and he testified that he even signed the agreement.

13. Plaintiff had also stated that he is the one who utilizes the land and this claim was supported by his witness (PW 2).

14. In support of his claim plaintiff also produced the following documents.

- i. Receipt of Shs.600 indicating the fees paid to the advocate when agreement was made.
- ii. Consent to institute suit from the land adjudication officer.
- iii. A letter dated 16.11.2007 from the ministry of lands confirming that the land is in the name of the appellant, (M'Mungania M'Iniu).
- iv. Demand letter.

15. Plaintiff avers that he only learnt that the land had been sold by 1st defendant to second defendant on 16.11.2007.

16. 1st defendant on the other hand denied having ever entered into any agreement for sale of the suit land with the plaintiff and he also denies halving ever been paid the consideration price of shs.68,000. He also denies that the signature on the agreement (PExh 1) is his.

17. 1st defendant however states that he did sell the land to 2nd defendant as per the agreement produced as Dex 1. His evidence is in tandem with the evidence of 2nd defendant.

18. In Cross Examination, 2nd defendant had stated that he has never utilized the land because when he went there, he was chased away by 1st defendant's brother who informed him that the land had a dispute. He was then stopped from using the land by the chief.

19. DW 3, the chief had told the court that the land in dispute had been brought to his office severally as from 2007 – 2008. He was not able to tell as to who occupies the land.

20. I have taken into account all the arguments raised herein including the submissions filed by the parties.

Ground I: Whether the suit was time barred

21. It is submitted for the appellant that the suit in the lower court was time barred under limitation of actions act as a claim based as contract ought to be lodged within 6 years form the date of the contract.

22. It is also submitted that under section 7 of limitation of actions Act a claim to recover land cannot be lodged after 12 years and that the suit was filed after 12 years had lapsed form 14.3.1995.

23. The respondent on the other hand has submitted that the cause of action arose in or about October 2007 when the plaintiff discovered that the land had been sold. It is submitted that this is when the breach occurred.

24. I find that parties are bound by their pleadings and evidence adduced. On the issue of the suit being time barred, all that the defendants stated in their pleadings is that the suit is time barred..... and that **“the defendant shall raise a preliminary objection on a point of law to have the suit dismissed”**.

25. No such preliminary objection was ever raised. No evidence was adduced to support this claim.

26. The appellant cannot now purport to submit on a claim that is not supported by any evidence. The appeal fails in ground 1.

Ground 2: Consent from the adjudication officer

27. It is submitted that plaintiff had not obtained the requisite consent from the land adjudication officer when the suit was filed.

28. The respondents on the other hand aver that the claim was on specific performance of the agreement hence no consent from the district land adjudication officer was even obtained.

29. Again this is an issue that ought to have been canvassed during the trial especially considering that plaintiff had produced a consent as Pexh 3. Plaintiff was not even cross examined on this document. Defendants cannot now turn around and claim that there was no consent. Appeal fails in ground 2

Ground 3: Cancellations of the title

30. It is averred by appellants that the learned Magistrate allowed this claim when no such prayer had been sought for. That is however not true as this prayer is captured in point (b) of the plaint. Appeal fails in ground 3.

Ground 4: Occupation

31. It is submitted by appellant that it was hotly contested as to who was in occupation and that not even the chief could tell who was in occupation. It is further averred that the trial Magistrate ought to have ordered for a scene visit to confirm who is in occupation.

32. On respondent's side, it is submitted that 2nd defendant knew that the land had been sold to plaintiff who was in occupation.

33. The defendants are the ones who testified after plaintiff and his witnesses. They had the opportunity of gauging the case to see if it was necessary to have a scene visit or not. Did they make such a request? No! They cannot now place the blame on the magistrate.

34. What is apparent is that the dispute concerning the suit land occurred from 2007 when 2nd defendant allegedly bought the land. The chief (DW 3) has confirmed this fact. What 2nd defendant had stated in the lower court was that.

“I don't use the land the chief stopped me. Before the chief stopped me, I had not cultivated the land.....”. The logical conclusion to make from this evidence is that 2nd defendant had been unable to take possession of the land because it had a claimant. And from the record the only person who was staking a claim on this land is the plaintiff and **no one else**.

35. The Magistrate had correctly captured the contradiction in the defence testimony as follows **“I note from the testimonies of the 1st and 2nd defendant that the two indeed contradicted each other regarding occupation and possession of the land. The first defendant said it is his brother that is in occupation of the said land while the 2nd defendant said the land is presently unoccupied. The defendants are therefore liars. On the other hand I find that the testimony of the plaintiff is well corroborated by PW 2 who said as did the plaintiff that the land is in the plaintiff's possession. I am convinced by the plaintiff's version”**.

36. It is clear that the trial magistrate had properly analyzed this issue of occupation before arriving at his conclusion. Appeal therefore fails in ground 4.

37. In conclusion I find that this appeal is without merits. The same is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28th FEBRUARY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

C.P Mbaabu holding brief for Gichunge for appellant present

HON. LUCY. N. MBUGUA

ELC JUDGE