



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC APPEAL 8 OF 2016**

**BARTHOLOMEW MWANYUNGU & OTHERS ..... APPELLANTS**

**-VERSUS-**

**FLORENCE DEAN KARIMI ..... RESPONDENT**

**JUDGEMENT**

1 The Respondent entered into a land purchase agreement dated 6<sup>th</sup> March 1986 with one Charo Sanga Lugukia (now deceased) who was admittedly the grandfather of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants for the purchase of a 6 acre portion of Plot No. 473 Mtwapa settlement scheme then under the settlement fund Trustee, at a price of Kshs. 72,000/= . The Respondent substantially paid the whole purchase price and temporarily entered into possession. However, in 1996 while the sub-division and sale was still incomplete the deceased passed away. The deceased had also not facilitated the transfer prior to his demise, although the Land Control Board gave consent for sale of the 6 acres on 30<sup>th</sup> January 1986 which was before the agreement for sale was executed. Following sub-division process, the 6 acres that the Respondent purchased became known as plot No. Kilifi/Mtwapa/774B.

2 The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants purportedly sold the said 6 acres to the 1<sup>st</sup> Appellant who took possession of the suit property, prompting the Respondent to file suit in the subordinate court seeking a declaration that the suit property belonged to her, an injunction and an order directing the Executive officer of the court to execute all necessary documents to effect a transfer of the suit property in favour of the plaintiff as well as costs of the suit.

3 The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants filed defence denying the Respondents Claim. They further contended that the claim was incompetent and time barred by virtue of the provisions of the Limitation of Action Act, Cap 22 Laws of Kenya.

4 The subordinate court found in favour of the Respondent and entered judgement as prayed for in the plaint. The Appellants were dissatisfied with the said decision and filed the present appeal on the following grounds:

**1) That the learned trial magistrate erred in Law and in fact in failing to appreciate that the plaintiff's suit was time barred under section 4 of the Limitation of Actions Act, Cap 22 Law of Kenya which ground formed a substantive defence to the claim before it.**

**2) That the learned magistrate erred in law in neglecting wholly to make any definitive pronouncement or at all on the defence of limitation taken by the appellants before him.**

**3) That the trial magistrate erred in law and in fact in not accepting that the transaction for the sale of the suit Land to the respondent herein was vitiated by non-compliance with the mandatory requirements of the Land control Act, cap 302 in so far as there was in respect thereof no consent as envisaged by Section 6 of the same Act.**

**4) That in the alternative the trial magistrate erred in failing to appreciate that the purported consent not only predated the sale but was also in relation to the sale of parcel of land the title in respect whereof was not in existence still.**

**5) That the learned magistrate erred in law and in fact in failing to make a finding that the sale agreement the basis of the transaction subject of the dispute contained within it a complete remedy to the respondent hereto by way of monetary compensation of the purchase price in the event of non-performance and or breach.**

**6) That the learned magistrate erred in law in failing to recognize or accept that the suit as framed had been brought in abuse of the court process in so far as it was essentially a suit for specific performance (as evident from the relief granted) brought as a declaratory action only so as to defeat or circumvent the defence of time bar.**

**7) That the learned magistrate did not address his mind to the submission by the appellants based on both pleadings and**

evidence that the suit was being urged against the estate of a deceased person yet contrary to the provisions of order 5 rule 2 of the Civil Procedure Rules the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants though heirs of the deceased proprietor had not been sued in their capacity of administrators.

**8) That the learned magistrate erred in altering the time limited by Section 79G for filing of appeal to 14 days, to the appellant detriment.**

5 The appeal was canvassed by way of written submissions which were duly filed by both parties. Ms. Mugoya who appeared for the appellants relied entirely on the written submissions filed.

6 The Appellants submitted that the respondent action, though couched as a declaratory suit, was in fact one for specific performance of a contract for the sale of land and that under Section 4 of the Limitation of Actions Act requires that in action arising from contract, the suit lies only within 6 years from 6<sup>th</sup> March 1986 when the agreement for sale was entered between the respondent and the deceased. In addition, the appellants submitted that the respondent's claim which was for recovery of land had been extinguished as the action would not lie after 12 years.

7 The appellants further submitted that the trial court erred in failing to hold that the respondent had an efficacious remedy well defined in the agreement which was to the effect that in the event no transfer was effected, the respondent would be entitled to refund of the purchase price paid and compensation for developments done. It was also the appellant's submissions that there was no valid consent within the meaning of Section 6 of the Land Control Act, Cap 302 and that the purported consent as exhibited was a contrived document. They also submitted that it was irregular and unlawful for the court to make orders allowing the respondent's suit the effect of which orders would be to annex part of the estate of deceased person without an action having been brought against the estate of the deceased.

8 Ms. Murage who appeared for the respondent submitted that the suit was not time barred because the same was not seeking specific performance but rather a declaratory suit. She further submitted that the learned magistrate considered the defence and properly exercised his discretion in favour of the respondent. Counsel added that there was consent from the land control Board which was produced by the respondent, and that even if the consent was not valid, a constructive trust had been created between the respondent because the suit property had already been sold to the respondent by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants' grandfather and only the conveyance process that was incomplete. The respondent relied on the case of *Macharia Mwangi & 87 Others -vs- Davidson Mwangi Gakiri, Civil Appeal No. 6 of 2011 at Nyeri*, and the case of *National Bank of Kenya Ltd -vs- Pipeplastic Samkolit (k) Ltt & Another (2001) eKLR*.

9 I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by learned magistrate were justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the ground of appeal are:

- a) Whether the suit, though pleaded as a declaratory suit, was suit for specific performance and whether it was time barred.**
- b) Whether the sale agreement was vitiated by non-compliance with the mandatory requirements of the Land Control Act.**
- c) Whether the lower court was right in determining that a refund to the respondent was not equitable or just.**
- d) Were the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants rightly enjoined as parties to the suit.**

10 With regard to whether the suit was one for specific performance though couched as a declaratory suit, the appellants submit that the plaintiff show that though couched as a declaratory suit, the respondent's action before the lower court was in fact one for specific performance of a contract for the sale of land. In that light, the appellants submit, it is inescapable that the question of limitation such as to when the cause of action arose and whether the suit had been brought within the time limit set out by the Limitation of Actions Act, must necessarily creep into the matrix. Section 4 of the limitation of Actions Act requires that in actions arising from contract, the suit lies only within 6 years.

11 In the plaint, the respondent states that in 1986, she entered into an agreement for sale with the deceased whereby she purchased 6 acres out of land known as Mtwapa settlement scheme plot No. 473 and that she paid the full purchase price. That the deceased commenced the process of sub-dividing the said plot and the 6 acres that the respondent purchased became known plot No. Kilifi/Mtwapa/774B. The respondent further states that the deceased died before he could complete the transaction, and that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants would apply for letters of administration so that they could complete the conveyance process with regard to the 6 acres in favour respondent. Among the reliefs sought by the respondent in the plaint is an order for execution of the transfer documents in her favour in light of the demise of the deceased.

12 In my understanding this specific order required the performance of an obligation or action the deceased was required to perform so as to complete the contract. In my considered view, the respondent's claim was not purely a declaratory suit. It is clear from the pleading and the relief sought as well as the evidence on record that the respondent was seeking the remedy of specific performance which is the execution of the transfer documents so as to complete the contract the respondent and the deceased entered into. The suit property was yet to be transferred to the respondent by the deceased before his demise. The respondent admits in the plaint that it was still waiting for the process (of transfer) to be completed when she learnt that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants had purportedly sold the suit property to the 1<sup>st</sup> appellant, hence the filing of the suit in the subordinate court. I therefore agree with the appellants submission that the learned magistrate erred in failing to discern the mischief in which the action was couched as one for declaratory of rights rather than specific performance.

13 The appellants' had raised the defence of Limitation. The respondent having allegedly entered into a contract for the sale of land in 1986, her right to specific performance lapsed upon the expiry of 6 years from that date in accordance with Section 4 of the limitation of Actions

Act. Had the learned magistrate addressed himself to this, no doubt he would have found, as I now find that any right to specific performance under the said contract would have in fact become extinguished as of 1992. I therefore find merit in grounds 1, 2 and 6 of the appeal.

14 Grounds 3 and 4 of the appeal basically resolve around the issue whether the sale agreement was vitiated by non-compliance with the mandatory requirements of the Land Control Act. There can be no dispute that the sale transaction required the consent of the Land Control Board and that in absence of consent the agreement for sale would become void for all purposes. Indeed the learned magistrate was alive to this fact when he stated thus in his judgment. "The necessary consent to the sale and sub-division were issued out to the plaintiff and the late deceased Sanga Lubukia. The necessary consents which are still valid having been given out the land was sub-divided by Kasyi and Company Surveyors..."

15 It is, however the appellants submission that there was no valid consent within the meaning of Section 6 of the land Control Act. The appellants contends that the consents which were produced as exhibits predated the sale agreement, thereby giving rise to the possibility that they were contrived documents, more so in the absence of minutes of the relevant meetings at which the consents were obtained.

16 I have perused the consents that were produced as exhibits. One consent is for sub-division while the other is for sale of parcel No. 473B. Both consents are dated 30<sup>th</sup> January 1986 which is over one month before the date of the agreement itself. Whereas the consent to sub-divide may have been obtained on 30<sup>th</sup> January 1986, I find it curious that consent to sell was given even before the parties had entered into the agreement for sale.

17 Section 8 of the Land Control Act provides that an application for consent in respect of a controlled transaction shall be made within six months of the making of the agreement. My understanding of this legal provision is that parties enter into the transaction then make the application for consent within the stipulated period, which in this case is six months. I therefore agree with the appellants submissions that the trial magistrate erred in law and in fact in not accepting that the transaction for sale of the suit land to the respondent was vitiated by non-compliance with the mandatory requirements of the Land Control Act in so far as there was in respect thereof no consent as envisaged by Section 6 of that Act. The purported consent not only predated the sale but was also in relation to the sale of a parcel of land the title in respect whereof was not in existence at the time if indeed the consent for sale was obtained on 30/1/1986, one wonders why transfer was not executed by the deceased for over a period of 10 years until his demise in 1996, considering that the purchase price had been paid to the deceased in full. To me, this raises some doubts about the validity of the consent. In my view the predated consent was not valid in the absence of other supporting evidence. Grounds 3 and 4, in my view are merited. The land transaction in this case required Land Control Board consent and became void for all purposes in the absence of a valid consent.

18 The seventh ground of appeal related to the issue of whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants had sufficient capacity and authority to be sued. The agreement the basis of the suit was entered into between the respondent and the deceased Charo Sanga Lugukia, the grandfather to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants. In paragraph 6 of the plaint, the respondent states that it was agreed between her and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants that the appellants would apply for letters of administration for the estate of the deceased so that they would complete the conveyance process of the land sold by the deceased in favour of the respondent. In his judgment, the learned magistrate stated that "the land should be transferred to her (respondent) by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as they are the legal representatives of the estate of their grandfather who owned the land they now have taken over from the plaintiff and have failed to give her quiet possession of this and if the defendants 2,3 and 4 did not wish to sign the transfer forms to the plaintiffs land, then the Executive Officer of the court will do it."

19 Order 4 Rule 4 of the Civil Procedure Rules provides:

**"...where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued and ...it shall be stated how that capacity arises."**

None of the appellants was said to have been sued in a representative capacity yet it is clear that orders sought would have the effect of transferring part of the estate of the deceased without an action having been brought against his estate. The respondent in my view was non-sued against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants who were merely the grandchildren of the deceased vendor, and had not been sued as personal representatives of the estate. Ground 7 of the appeal is therefore merited and the same is upheld.

20 Regarding the fifth ground of appeal, it is submitted that the learned magistrate erred in failing to appreciate that the sale agreement the basis of the transaction subject of the dispute contained within it a complete remedy to the respondent in the event of failure or breach of the agreement. According to the learned magistrate, the respondent was entitled to the land and not refund as proposed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellant. Respectfully, that is not the true legal position. Section 7 of the Land Control Act provides:

**" If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22."**

Hence, a party to a controlled transaction that has become void may recover any money or other valuable consideration as a debt, nothing more. However, in this particular case, the respondent and the deceased had expressly agreed that in the event no transfer is done in favour of the respondent, the respondent would be entitled to refund of all money paid and all developments done by the respondent on the land. This remedy was therefore available to the respondent to pursue.

21 The upshot of this is that this appeal has merit and the same is allowed with costs. The judgment/decree of the lower court in CMCC No. 3321 of 2009 is set aside and in lieu thereof an order is hereby made dismissing the plaintiff's suit with costs.

**Dated signed and delivered at Mombasa this day 18<sup>th</sup> April 2018.**

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**C. YANO**

**JUDGE**