



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 8 OF 2018

JOSEPH NDAYALA MUYESU.....APPELLANT

VERSUS

THOMAS KIMUTAI BOIT.....1ST RESPONDENT

JOSIAH KIMEBOR KIBIAS.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. Mokuu, SPM in the Chief Magistrates Court at Eldoret in Civil Case No. 885 of 2007 dated 17th June 2014)

JUDGMENT

The Appellant filed a Memorandum of Appeal dated 17th June 2014 having been dissatisfied with the judgment and decree of Senior Principal Magistrate Eldoret Honourable S. Mokuu delivered on 17th June 2014 in ELDORET CMCC NO. 885/07.

Background

The Appellant listed 10 grounds of appeal in his Memorandum of Appeal as follows;

- 1) That the Learned trial Magistrate erred in law and in fact in dismissing the appellant's suit contrary to the facts and the evidence tendered in the entire suit.
- 2) That the Learned trial Magistrate erred in law and in fact by failing to independently analyze and consider all the issues raised by the Appellant.
- 3) That the Learned trial Magistrate erred in law and in fact in failing to appreciate the basic tenets of the Land laws.
- 4) That the Learned Trial Magistrate erred in law and fact in basing his judgment on issues already determined by the court on its ruling.
- 5) That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit on the ground that the suit was time barred in total disregard to Section 26 of the Limitation of Actions Act (Rev. 2012).
- 6) That the Learned Trial Magistrate erred in law and fact in relying on Section 4 of the Limitation of Actions Act Cap 22 which is based on contract whereas the Appellant claim was on Land transaction whose limitation period is 12 years.
- 7) That the Learned Trial Magistrate erred in law and fact in failing to find as a fact that the Appellant indeed exchanged his parcel of land No. UASIN GISHU/KAHUNGURA/278 measuring 5 acres with that parcel of Land No. UASIN GISHU ILLULA SCHEME/126 measuring 5 acres belonging to the Respondent herein.
- 8) That the Learned Trial Magistrate erred in law and fact by failing to analyze the Land Control Board consents between the appellant and the Respondent, the demeanor and inconsistency and/or veracity of the Respondents.
- 9) That the Learned Trial Magistrate erred in law and fact in failing to consider the entire submissions tendered by the Plaintiff.
- 10) That the Learned Trial Magistrate erred in law and fact in failing to consider the Respondents were represented by authorized person or advocates.

Counsel for the Appellant filed written submissions and urged the court to allow the appeal in its entirety on the grounds stated above. He also urged the court to set aside the judgment delivered on 17th June 2014 and enter Judgment for the appellant as prayed for in the plaint plus costs of the appeal.

Counsel listed the issues for determination by the court as follows:

- 1) Whether the Learned Trial Magistrate based his Judgment on issues already determined at the interlocutory stage.
- 2) Whether the issue for determination was based on law of contract or based on land transaction. Whether the Appellant demonstrated that he exchanged his parcel of land namely UASIN GISHU/KAHUNGURA/278 for Land Reg No. UASIN GISHU ILLULA SCHEME/126.
- 3) Whether the Learned Trial Magistrate in his Judgment analyzed the Land Control Board Consents and its inconsistencies.
- 4) Whether the Learned Trial Magistrate based his Judgment on issues already determined at the interlocutory stage

Counsel submitted that it is on record that the Respondent at the trial court raised a Preliminary Objection challenging the limitation period and pecuniary Jurisdiction of the trial court to hear the matter of which the trial court rendered its ruling on 29th May 2008 dismissing the preliminary objection as it lacked merit.

Mr. Omboto Counsel for the Appellant submitted that the matter was then set down for hearing and upon delivery of the Judgment, the Learned Trial Magistrate erred in contradicting himself by holding that the cause of action was founded on contract pursuant to Section 4 of the Limitation of Actions Act whose limitation period is 6 years, an issue which had already been determined and/or settled by the court. It was further Counsel's submission that the cause of action arose by virtue of a land transaction, an issue already settled by the Preliminary objection, and that the Hon. Magistrate therefore erred to purport to review and/or sit on appeal on its own decision as the court was functus officio. Counsel cited the English case of JERSEY EVENING POST LIMITED -VS- AL THANI (2002) 542 at Pg. 550 which held that the Respondent did not review/appeal thus the court could not move on its own motion in an already concluded matter.

Mr. Omboto for the appellant further relied on the case of PATRICK GATHENYA -VS- ESTHER NJOKI RURIGI & ANOTHER (2005) eKLR where the court stated that;

'I have said enough, I believe to show that when one considers our statutory position and the authorities based on the statutes, this court still has no jurisdiction to re-open, re-hear and then recall its earlier decision and substitute it with another...a party who feels that the court, by its decision, has injured his or her fundamental right has the right to go to the High Court so that that court can, in effect, reverse the decision of this court made on an appeal from a decision emanating from the very selfsame High Court.. I wish we had the power to recall or review our judgments...but the court does not have that power. Perhaps I can at least hope that parliament may in its own good time one day intervene in the matter. Until such time as such intervention would have come, this motion cannot succeed.'

It was Counsel's submission that the Learned Magistrate misdirected himself in purporting to redetermine issues already dealt with and therefore the appeal should succeed.

On the issue as to whether the issue for determination at the trial court was based on law of contract or land transaction, Counsel submitted that the present suit arose by dint of a land exchange transaction in respect of that parcel of land namely UASIN GISHU/KAHUNGURA/278 and UASIN GISHU ILLULA SCHEME/126. He further stated that the cause of action arose by virtue of breach of that exchange of land transaction which particulars of breach the Appellant relied on were as follows;

- a. Failing to honour the terms of the agreement
- b. Failing to give the Plaintiff vacant possession of Uasin Gishu Illula Scheme/126
- c. Frustrating the exchange of land with the Plaintiff/Appellant
- d. Failing to effect the transfer as had been agreed
- e. Reselling part of the exchanged land to 3rd parties

Counsel therefore submitted that the learned Magistrate misdirected himself when he dismissed the suit on the ground that it was time barred by dint of Section 4 of the Limitations of Actions Act, Cap 22 which issue had been dealt with in a preliminary objection. Further Counsel stated that it is trite law that in Land transaction, Section 26 of the Limitation of Actions Act clearly stipulates that the limitation period is 12 years which period had not lapsed in this case as the agreement was entered into in 1997 and the suit was filed in 2007 hence it was not time barred.

Mr. Omboto for the Appellant stated that the Appellant had demonstrated that he has exchanged his parcel of land with the respondent namely UASIN GISHU/KAHUNGURA/278 for land No. UASIN GISHU ILLULA SCHEME/126 with an agreement for exchange to boot. He stated that the Appellant testified and produced the following documents:

- 1) Application to Land Control Board.

2) Minutes No. 460/97 of Ainabkoi Land Control Board.

3) Letter of Consent (executed by the Respondent in favour of the Appellant in that parcel of land known as UASIN GISHU ILLULA SCHEME/126).

He submitted that the said documents were executed by the Appellant and the Respondent in respect to UASIN GISHU/KAHUNGURA/278 owned by the Appellant in exchange of UASIN GISHU ILLULA SCHEME/126 owned by the Respondent which instruments the trial Magistrate did not even consider in his judgment. Further that the Appellant's claim was corroborated by the evidence of Eucabeth Matoke Ogege (PW2), Officer from Ministry of Lands, Adjudication and Settlement, Uasin Gishu County and Tom Chepkwesu (PW3), The Uasin Gishu District Land Registrar who confirmed that the Appellant transferred his parcel of land by way of exchange with Plot No. 126/111ula/Scheme.

It was Counsel's submission that PW3 confirmed that the application for consent by way of exchange was for two parcels namely Plots Kahungura/278 and 126, Illula Scheme. And the Respondent could not explain why he executed transfer documents in favour of the Appellant which facts were never even touched on in the Learned Magistrate's Judgment. That the 1st and 2nd Respondents in their own evidence confirmed that the exchange of land agreement existed and that they benefitted from the exchange and deprived the Appellant from what was lawfully his.

Counsel finally submitted that the court has powers to reevaluate and analyze the evidence afresh and come to its logical and independent findings as was held in the case of Mwanasokoni —vs- Kenya Bus Services Ltd (1988) eKLR whereby the Learned Judge held as follows;

'...it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary...'

He therefore urged the court to allow the appeal with costs to the appellant.

1st AND 2ND RESPONDENTS' WRITTEN SUBMISSIONS

The respondents filed their written submission and opposed the appeal. Counsel for the respondents submitted that from the appellant's submission, it was not disputed that the suit was founded on breach of the mutual contract on the part of the defendants; that the cause of action arose sometime in 1997 and the appellant filed the suit sometime in 2007, ten years after cause of action arose; that No LCB Consent was obtained with respect the parcel of land known UASIN GISHU/ILLULA/_126; and that the genuineness of the written note produced as DExh-5 wasn't challenged by the appellant at trial.

Counsel listed the following issues for determination by the court.

- 1) Whether the issues determined in the ruling of the preliminary objection are those also determined in the judgment;
- 2) Whether the suit was time barred;
- 3) Whether the agreement between the parties herein involving UASIN GISHU/ ILLULA/126 was valid when no LCB Consent was obtained; and
- 4) Whether the Appellant is entitled to the prayers sought.

Mr. Tororei for the respondents submitted that the preliminary objection raised by Counsel for the defendants was heard and the court gave its ruling on 12/6/08. The ruling was to the effect that no documentary evidence had been produced for purposes of ascertaining the pecuniary jurisdiction of the court regarding the suit property and further that the issues concerning consent of the land control board would be dealt with during hearing.

Counsel also submitted that the issues for determination during judgment were regarding whether the suit was time barred on the basis that the matter was one founded on contract. Therefore he stated that the argument advanced by the appellant in his grounds that the Honourable Magistrate based his judgment on issues already determined by the court in its ruling is misplaced.

It was Counsel's submission that the appellant admitted in his plaint as per pages 9 to 10 in the record of Appeal that appellant pleaded breach of a mutual agreement by the defendants therefore falling under the ambit of contract law which limitation of filing suits is 6 years. He stated that the appellant also admitted that there was no written agreement produced to establish the exchange.

Counsel further submitted that the claim that the suit was based on recovery of land is unfounded as for one is to plead that a claim is one in the nature of a land transaction whose limitation period is 12 years, then it must pertain to one recovering land under section 7 of the Limitation of Actions Act. To claim recovery of land, one must have had a claim to it before so as to be dispossessed unlawfully either through title or possession which is not the case in the current suit.

It was Counsel's submission that the appellant acknowledged the 2nd defendant as the registered owner of land parcel known as UASIN-GISHU/ILLULA/126 and also sought specific performance of a contract pertaining to the said parcel of land. Counsel cited the case of Michael Maina Nderitu -Vs- Kenya Power and Lighting Co. Ltd & another 34 of 2010 eKLR where Nduma J observed that the issue of limitation is not a mere technicality but a jurisdictional one. And that

"No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, in an action founded on contract. The corollary to this is that no court may or shall have the right or Power to entertain what cannot be done namely, an action that is based on contract six years after the cause of action arose or any application to extend such time for bringing of the action based on contract"

It is the Respondents' submission that, the Appellant's suit was time barred and the Appellant is therefore guilty of laches. Further that it is not disputed that the transaction was a controlled transaction under section 6 of the Land Control Act which required a consent from the Land Control Board which was not obtained as required. The said section provides as follows:

6. Transactions affecting agricultural land

(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 its 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

Counsel stated that from the record it is clear that there was no Land Control Board Consent obtained pertaining to Uasin Gishu/Ilulla / 126 within 6 months of the agreement and that the Land Control Board consent was only for land parcel no. Uasin Gishu/Kahungura/278 therefore the entire transaction was thus void and unenforceable and that the appellant wasn't entitled to the prayers as sought. He cited the case of Mary Nduta Kimemia vs John Warubi Kibera (2017) e KLR a land transaction void for failure of the parties to obtain Land Control Board Consent within the prescribed time where it held as follows,

Regard must be had to the fact that the sale transaction between the Plaintiff and the Defendant was a controlled transaction under the Land Control Act Cap 302 of the Laws of Kenya as it relates to agricultural land. Land control board consent was required to be obtained within 6 months of the making of the agreement for the controlled transaction. As conceded by the Parties, no land control board consent was obtained within the Prescribed time for the two sale transactions. That being the case, the sale transactions became void.

Counsel therefore prayed that the appeal be dismissed with costs to the respondents.

Analysis and determination

The issues for determination in this appeal are as to whether the suit was time barred, whether the transaction was based on contract law or land law as per section 7 of the Limitation of Actions Act. The other issue is whether there was a consent of the Land Control Board as required by law for the exchange of the parcels of land.

From the pleadings in the record of appeal it is clear that the parties entered into an exchange agreement of land and that they went to the Land Control Board and were granted a consent for the exchange of parcel no. UASIN GISHU/KAHUNGURA/278 and UASIN GISHU ILLULA SCHEME /126. The respondent admitted that he took possession of the exchanged land. The consent in minute 460/97(44 states that the application by JOSEPH MUYESU of UASIN GISHU/KAHUNGURA/278 to transfer 5 acres to THOMAS KIMUTAI BOIT by way of exchange with plot No. 126 UASIN GISHU ILLULA SCHEME. Consent granted wife gave okay. Is there any more consent that was required apart from this?

The fact that the parties were exchanging land make the transaction a land transaction. The appellant and the respondent made their intention known by appearing before the settlement officer who gave evidence as PW2 and produced the minutes for the Land Control Board approving the exchange. A consent for the exchange was also produced by the appellant.

Parties should not be allowed to enter into sale agreements for land and then midstream when the reason for selling the land ceases turn around and use the provisions of the Land Control Board that there was lack of consent within the stipulated period. Courts have held in several cases where parties have tried to renege on such agreements by holding that there existed a constructive trust and ordered for specific performance.

The Court of Appeal sitting in Eldoret held in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** that

*".....we are in agreement with the **Macharia Mwangi Maina decision** that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance".*

That Court of Appeal further held that the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.

I find that the learned magistrate erred in not considering all the issues at hand and only dealt with the issue of the transaction being governed by contract law therefore time barred as per section 4 of the Limitation of Action Act. The respondent admitted that he took possession of the land that they exchanged with the appellant but did not say what happens to the land that the appellant was to get.

The evidence of the appellant was corroborated by the evidence of PW 2 that a transaction was done in their office for exchange of the two parcels of land by the appellant and the respondent. PW2 was a government officer who was shedding light on what transpired without leaning towards any party.

PW 3 further reinforced the appellant's evidence on the transaction for the exchange of the land parcels between the appellant and the respondent. He was the secretary for the land Control Board and produced minutes of the transaction whereby the transaction for exchange was approved. What more would the parties require when a consent has been granted for the exchange as per the parties wishes in line with the requirement of the law.

From the above analysis I find that this appeal has merit and it is allowed. I therefore order the judgment of the trial magistrate is set aside and substituted with judgment for the appellant as prayed in the plaint. Costs of this appeal to the appellant.

Dated and delivered at Eldoret this 11th day of July, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Miss Kibichy for Appellant and Miss Moraa for the 1st and 2nd Respondent.

Mr. Koech – Court Assistant.