



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 60 OF 2000**

**MIRITI M'ITHINYAI.....APPELLANT**

**VERSUS**

**NJAGI MBOGORI .....RESPONDENT**

**JUDGMENT**

1. The appellant filed a memorandum of appeal dated 26/6/2000 in which he raised the following grounds:-

1. That the Senior Resident Magistrate erred in law in ordering that LR. ABOGETA/U-KITHANGARI/707 should be transferred to the respondent while there was no written sale agreement between the parties.
2. The learned Senior Resident Magistrate erred in law in ordering that the suit land be transferred to the respondent while there was no Land Control Board authorizing the transfer.
3. The learned Senior Resident Magistrate erred in law in awarding the suit land to the respondent on the strength of a defective and invalid Land Control Board Consent which had nothing to do with the parties.
4. The learned Senior Resident Magistrate erred in law in holding the cause of action if any started to run in 1989 and not 1973 when the alleged transaction took place.
5. The learned Senior Resident Magistrate erred in law and in fact by holding that the plaintiff took possession of the suit land No. ABOGETA/U-KITHANGARI/707 where there 1,473 (sic) tea bushes and the plaintiff was in turn to plant equal number of plants for the defendant in the defendant's portion of land and the plaintiff did plant 972 plants for the defendant while there was no such evidence adduced in court.
6. The learned Magistrate erred in law and in fact by holding that NJAGI MBOGORI and M'BURI M'IMONGI refer to one and the same person while there was no evidence produced in court to show that.
7. The learned Senior Resident Magistrate erred in law and in fact by holding that the issue of names of the plaintiff was settled in an application dated 1<sup>st</sup> August, 1994 while that application has never been heard to date.
8. The learned Magistrate erred in law and in fact by holding that the evidence of the two witnesses called by the plaintiff corroborated the plaintiff's evidence while that was not so as the two witnesses did not witness any sale agreement between the parties and when PW3 said that the land being sold was No. 507.
9. The learned Magistrate erred in law in entertaining the plaintiff's case which was clearly time barred.
10. The learned Senior Resident Magistrate erred in law and in fact in entering judgment for the plaintiff against the weight of evidence and on evidence and matter which were not produced in court.

2. The appellant prayed for the order of the learned trial magistrate be set aside and the court do make appropriate orders in the interest of justice and that the appeal be allowed with costs to the Appellant.

3. It is proper to first trace the history of the dispute between the two parties in this appeal. The dispute between the appellant and the respondent came to court by way of a plaint dated 25<sup>th</sup> January 1989. In that plaint the respondent in this appeal sued the appellant and sought the following orders:

- a. “An order for specific performance and grant parcel registration No. Abogeta/U. Kithangari / 707 to the plaintiff;
- b. An order empowering the executive officer of this honourable court to sign documents for execution of the decree of this court;
- c. Costs of this suit be provided for;
- d. Any other relief this Honourable court may deem just and expedient to grant.”

4. Another plaint other than the original plaint was filed on **8/12/94**. The only visible change in that second plaint is that the plaintiff ceased representing himself and became represented by the firm of Dauti Kibanga & Co Advocates. The defendant deemed it an amended plaint even though it was not headed so and filed a defence to the amended plaint and counterclaim on **21/2/1995**.

**The plaintiff's case.**

5. In the amended plaint the plaintiff's case was that the plaintiff and the defendant entered into a written agreement. By it the defendant was to sell and the plaintiff was to buy **2 acres** to be carved out of **Abogeta/U.Kithangari/521** at the agreed price of **Ksh 1000/=**. Later both parties orally agreed that the price be raised to **Ksh 3,600/=** which the plaintiff paid in full in **1973**. Both parties applied for and were granted a Land Control Board Consent for subdivision on **3<sup>rd</sup> March 1973**. The terms of the consent was the subdivision of **Parcel Number 521** into two portions of **2 acres** and the balance. The defendant then subdivided the land into three portions, **707,708, and 709** in the same year and put the plaintiff into possession of **Plot Number 707**. There were **1434 tea tree** bushes thereon. The parties agreed that the plaintiff would plant a similar number of tree bushes on the defendant's land. However, despite many demands the defendant neglected to transfer the land parcel to the plaintiff “through the Land Control Board.”

**The defendant's defence.**

6. It was the defendant's defence that there was no such agreement or any land control board consent issued, or that he allowed the plaintiff exclusive possession of **Parcel Number 707** from **1973** onwards. He pleaded the alternative defence of limitation. There was also filed a counterclaim. In that counterclaim the defendant pleaded that in **1989** the plaintiff trespassed into the defendant's land and occupied it and he prayed for eviction.

**Defence to counterclaim.**

7. The allegations in the defence were denied by the plaintiff in the reply to counterclaim.

**8. Submissions of the Parties**

9. The appellant filed his submissions in the appeal on **30<sup>th</sup> September 2013** while the respondent filed his on **9<sup>th</sup> May 2017**.

10. I have considered those submissions.

**Determination**

**Issues for Determination**

11. The issues that arise for determination in this matter are as follows:

- a. *Did the trial court err in ordering the transfer of the suit land to the respondent?*
- b. *Did the trial court err in failing to find that the suit was time barred?*
- c. *Did the trial court err in finding that the issue of the names Njagi Mbogori and M'Mburi M'Imongi had been settled in an application dated 1<sup>st</sup> August 1994?*
- d. *What orders should issue?*

a. *Did the trial court err in ordering the transfer of the suit land to the respondent?*

12. On this issue the appellant submits that there was no proof of a sale agreement capable of being enforced in law. He cites **Section 3(3)** of the **Law of Contract Act** 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.***

13. He submitted that the plaintiff did not prove that the appellant was party to the agreement and that the maker of the agreement which was in Kimeru Language was not called to testify. He also submitted that there was no proof of payment of consideration between the parties. Further the respondent never tendered a Land Control Board Consent in respect of **Parcel No 707**. He relied on the provisions of **sections 6 and 7 of the Land Control Act**.

14. On the other hand the respondent argues that there was an agreement and the existence of such an agreement was buttressed by the issuance of the land control board to subdivide and transfer to the respondent. I have examined a copy of the **PEXh 1** which is the consent and I find that the same was issued on the **7<sup>th</sup> March 1973** to both the appellant and the respondent. It is true that the same buttresses the existence of the agreement. There is no likelihood that the parties would have gone to seek a land control board consent without having entered into an agreement, whether oral or written. In his evidence the respondent stated as follows:

***"We got the consent on 7/3/1973. We went to the land board before the agreement. We went to the land board first to get the consent since defendant's brother was resisting the sale."***

15. The defendant admitted that the consent was valid and that he had never gone to have it cancelled.

16. **PW2** and **PW3** also appeared to know of the transaction between the appellant and the respondent.

17. The appellant was not willing to testify about what had happened to the land between the year **1973** and the year **1989** when the suit was filed. That was a period of **16 years**.

18. Though it is notable from the record that they agreed they were not witnesses to the agreement, the plaintiff's witnesses at the trial agreed that the respondent has been in occupation of the land since the year **1973**. **PW3** also testified that he was present at the handing over of the cow, which formed part of the value of consideration, to the appellant herein that he witnessed the writing down of the agreement. He also witnessed the respondent give a cow which constituted a part of the consideration for the suit land. **PW2** testified that he was present when the land was being subdivided.

19. In my view the agreement that the plaintiff produced in evidence as **PEXh 2** was genuine. I find that the trial court was right in finding that the evidence of the plaintiff's witnesses corroborated that of the plaintiff, for indeed in its totality it tended to show that there was an agreement that was entered into between the parties.

20. Further, the trial court noted that the appellant had conceded that he had sold land to Njagi Mbogori and that the consent issued by the Land Control Board was valid as at the time of the hearing of the suit. Besides, the trial court also noted as follows of the appellant:

***"The denial by the defendant that Julius Munyungi was a minor which fact is contradicted by the evidence of the plaintiff and the contents of the consent clearly indicates that the defendant was not a truthful witness. He was the applicant in respect of the consent and being the applicant he knew of the status of the two transferees that were to get the land. Denial of such material fact that Julius Munyungi was a minor discredits the credibility of the defendant to the point that he is depicted as an unreliable witness who was out to distort the truth for his own gain. This is further confirmed or given credence by the fact that the consent also indicates that there was consideration that he was getting. The defendant had denied this fact in court. "***

21. I find this to be a correct observation on the part of the trial court. The defendant testified alone and there was no other evidence to lend credence to his defence after the evidence he gave was discredited.

22. Consequently I find that the trial court was right and it can not be faulted in coming to the conclusion that there was an agreement for between the appellant and the respondent which could be made the subject of orders of specific performance.

**b. Did the trial court err in failing to find that the suit was time barred?**

23. On the issue of limitation the submission of the appellant in the trial court was that the cause of action arose in **1973** and the case was filed in **1989**. He argued that the respondent did not claim adverse possession in his plaint. It was the submission of the respondent however that under the **1968** regulations a Land Control Board consent covered both subdivision and transfer. He also added that the transfer involved a minor and could not be effected till the minor attained majority age. He submitted that the cause of action therefore crystallised in the year **1989**.

24. The trial court stated that the party alleging limitation needs to prove it. The decision on this issue was premised on the defendant's own defence which somehow for once the trial court decided to rely on despite its earlier observation that the defendant was an untruthful witness.

The defence, which stated that the respondent had trespassed on the appellant's land in **1989**, had been on the record many years. The defendant had never found it fit to amend it.

25. In my view, the appellant had been finally entangled or trapped in the convoluted netting of his own pleading in the matter. Having denied that there was ever any agreement between him and the respondent, nothing prevented the trial court from relying on the veritably old defence which is presumed to be stating the truth. Therefore in this appeal the appellant cannot validly submit that the respondent's claim was time barred.

26. The trial court did not stop there; it further went on to explore the next possibility regarding the defence of limitation and stated as follows:

***“Even assuming that the cause of action arose in 1973 the fact that Land Control Board consent for subdivision and transfer having been obtained in time in law left the plaintiff in a position where he had title to land and what was left were the technical aspects of registration and execution of the documents required. To register the consent obtained the law and the process does not require the defendant to be present.”***

27. In my view this is also the correct position. It is also observed by this court that the prayer for specific performance, which is the principal prayer in the plaint, is an equitable relief. This is a fact that the trial court also appreciated while citing the case of **Samuel Kanogo Riitho vs Jadel Macharia Kariithi CA No 65 of 1982** for the proposition that the court would only withhold an equitable remedy relating to land only in certain special circumstances, and that the court is entitled to take into account all the circumstances including the conduct of the applicant and the hardship that may be inflicted upon a defendant. The trial court concluded that there is nothing in the conduct of the respondent herein, who was by then the plaintiff, which would disentitle him from the equitable remedy sought and that the appellant herein, who was by then the defendant, would suffer no hardship were the prayers granted. In addition the court found that the appellant herein was the party in default in that he failed to fulfil his part of the agreement. In its conclusion, the plaintiff deserved the orders sought. I have analysed the above outlined reasoning of the trial court in detail and I do not find any fault therein.

28. The respondent having bought the land and taken possession and having observed a major statutory requirement that was the obtainance of the Land Board's consent, he did not come to court to seek possession or recovery or any other relief that could fall to the defence of limitation. The property in the land had already effectively passed to him. The suit was occasioned purely by the refusal of the appellant to effect a formal transfer the land to him, and the court rightly notes that this is a part of the process in which the presence of the appellant was not a necessity. It is noteworthy that the plaintiff sought an order that the Executive Officer of the Court do execute the documents to effect the formal transfer of the land to him.

29. The court also observed that the consent of the Land Control Board was still valid as at the time of the trial and even the record of proceedings quotes the appellant confirming this. The Court also considered the fact that it had been agreed that the transfer would be effected once Julius Munyugi attained the age of majority and that the consent itself showed that he was a minor. The court further considered the evidence of the respondent that the minor was about **9-10 years** old and observed that though Julius was never produced in court, the court could presume that he was of about the age of **9-10 years** at the time of the agreement or issuance of land control board consent. Therefore Julius could have attained the age of majority in the year **1983**. Taking **1983** to be the appropriate date on which, for the purpose of this argument, the cause of action occurred, the court concluded that by the year **1989**, the cause of action could not have been said to have become time barred. I concur with the trial court's finding as aforesaid.

**c. Did the trial court err in finding that the issue of the names Njagi Mbogori and M'Mburi M'Imongi had been settled in an application dated 1<sup>st</sup> August 1994?**

30. From the outset it was clear that the plaintiff's name was to become an issue in the suit and it is not surprising that the issue has been brought up at this appellate level.

31. In the amended plaint dated **8<sup>th</sup> December 1994**, there appears to have been an attempt to amend the name of the plaintiff on that document. However in all subsequent documents including those of the defence read **Njagi Mbogori** as the plaintiff.

32. At the trial the evidence of the plaintiff and **PW2** was that the plaintiff went by both names of **Njagi Mbogori** and **M'Mburi M'Imongi**. The appellant's lone testimony did not dislodge this averment. The court found that the respondent adduced evidence that he was known by both names. This court too has perused the record of appeal and found that the plaintiff's evidence was not shaken in cross examination and the finding of the Trial court is therefore upheld.

33. On the issue of whether the application dated **1<sup>st</sup> August 1994** has ever been heard or not I note that the same first featured in the proceedings before the court on **9/11/94** when it was set down for hearing on the **28<sup>th</sup> November 1994**. The court record does not reflect what happened on that date. It is possible therefore that the main suit was heard before that application could be heard. However, I have noted that whether or not that application was heard and determined, the issue of names was settled in the evidence given in the main suit. In my view, it now matters not whether that application, if it involved the issue of names, was heard or not because the court made its finding thereon at the hearing which this court has also upheld.

**d. What orders should issue?**

34. The answers to all the above questions lead to the conclusion that the appeal before me has no merits. I therefore dismiss the appeal with costs to the respondent.

Dated, and signed at Kitale on this **1<sup>st</sup>** day of **August, 2018**.

**MWANGI NJOROGI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**

Delivered at Meru on this 29<sup>th</sup> day of August, 2018 in open court in the presence of:

Mr. Mutunga holding brief for Anampiu for appellant

Ms. Rimita holding brief for Mwanzia for respondent

C/AMutua

**MWANGI NJOROGI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE.**