



**REPUBLIC OF KENYA**

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

**ELC. APPEAL NO. 215 OF 2007**

**JEREMIAH KIILU MAITHA.....APPELLANT**

**VERSUS**

**AGNES NGEKI MUTIE.....RESPONDENT**

***(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in Civil Case No. 514 of 2003 delivered on 19<sup>th</sup> November, 2007 by Hon. E. Nderitu, Resident Magistrate)***

**JUDGMENT**

1. In the Memorandum of Appeal filed herein, the Appellant averred that the learned Magistrate erred when she held that the consent of the Land Control Board was not mandatory in respect to a transaction which falls within the ambit of Section 6 of the Land Control Act; that the onus of proving that the transaction was not a controlled one lay with the Defendant and that the learned Magistrate erred when she failed to find that the Defendant had failed to prove her Counter-claim.
2. The Appeal proceeded by way of written submissions. However, it is only the Appellant's advocate who filed his submissions. In his submissions, the Appellant's advocate submitted that the suit land is not situated in a Municipality or a township; that the suit land is within the rural area of Makueni County and that the consent of the Land Control Board was required in respect of the Sale Agreement that was entered into between the Appellant and the Respondent.
3. Counsel submitted that the Respondent's assertion that he had been in continuous occupation of the suit land for a period of twelve (12) years ought to have been proved during trial and that the trial Magistrate failed to appreciate that the Respondent had proved the requisite elements of adverse possession.
4. The Appellant's counsel finally submitted that the payment of the full purchase price does not cure the illegal contract entered into by the Appellant and Respondent.
5. The Appellant's counsel relied on several authorities which I have considered.
6. This being a first Appeal, this court is required to evaluate the evidence that was tendered in the lower court and arrive at its own conclusion.
7. In the lower court, the Appellant sued the Defendant alleging that the Agreement he entered into with the Respondent in respect of land known as Kibauni/Malunda/190 was null and void for want of the consent of the Land Control Board. In the Complaint, the Appellant prayed for a declaration that the said Sale Agreement was a nullity and for the Respondent to be refunded the purchase price.
8. In his Defence, the Respondent averred that he entered into possession of the suit land immediately he signed the Sale Agreement with the Appellant in 1991; that the Appellant is motivated by greed and malice and that the Appellant's sons have settled in Makueni and not on the suit land. The Respondent also filed a Counter-claim in which he averred that he is entitled to the suit land by way of adverse possession having been on the land for more than twelve (12) years uninterrupted.
9. In his evidence, the Appellant informed the court that he sold the suit land to the Respondent in 1991 without informing his family; that when his family declined to sanction the sale, he called the Respondent and informed him to collect the purchase price and that he declined to do so.
10. PW1 informed the court that he never obtained the consent of the Board to transfer the suit land to the Respondent and that the Defendant has not been in occupation of the land for more than twelve (12) years as claimed. The Plaintiff produced the Title Deed in evidence.
11. The Respondent's wife informed the court that her husband died in the year 2003; that her late husband purchased the suit land from the

Appellant vide an Agreement dated 9<sup>th</sup> August, 1991; that the suit land is about 15 acres and that she has been in possession of the land since 1991.

12. In his Judgment, the learned Magistrate held that the Land Control Act does not apply generally to all agricultural land; that the Act applies to the area the Minister for land has gazetted as a controlled area and that the Plaintiff had failed to prove that the suit land was a controlled area. The learned Magistrate further held that the Respondent had proved his case and allowed the Counter-claim.

13. As I have stated above, the Plaintiff's case was that the suit land, being agricultural land, required the consent of the Board before the transfer could be effected to the Respondent. It was on that basis that he sought for the nullification of the Sale Agreement dated 9<sup>th</sup> August, 1991.

14. The Agreement that was entered into between the Appellant and the Respondent shows that plot number 190 was within Malunda Land Adjudication Section. It is therefore obvious that the suit land was in an adjudication area by the time it was sold. All land under an adjudication area falls within what used to be trust land under the repealed Trust Land Act or Community land under the Community Land Act. Invariably, all Trust Land/Community land is agricultural land.

15. According to the definition of "agricultural land" by Section 2 of the Land Control Act, all land that is not within a Municipality or a Township or a Market is agricultural land. However, the Minister may declare any land in the Nairobi Area or in any Municipality, Township or Urban centre "agricultural" for the purposes of the Act.

16. Considering that the suit land was within an adjudication area, and in view of the fact that the Defendant never produced evidence to show that the suit land was within a Municipality, Township or Market, it follows that the suit land was agricultural land. It was therefore a misapprehension of the definition of "agricultural land" by the learned Magistrate when she held that agricultural land means the land that the Minister for Lands has by gazette declared as control areas.

17. As I have indicated above, the suit property was agricultural land. Consequently, any transfer or sub-division of the land required the consent of the Land Control Board. As was held by the Court of Appeal in ***Omuse Onyapu vs. Lawrence Opuko Kaale, Civil Appeal No. 21 of 1992***, if the transaction for the sale of land is controlled transaction involving the sale of an agricultural land within the meaning of Section 6 of the Land Control Act, it is null and void for all purposes for lack of consent of the appropriate Land Control Board.

18. Of course, in a situation where a Sale Agreement is null and void for want of the consent of the Board, a purchaser can still succeed to have such land registered in his favour if he proves that he took possession of the land and has been in such possession continuously, exclusively, peacefully and with the knowledge of the registered owner for a period of twelve (12) years.

19. According to the Respondent's wife, the Respondent took possession of the suit land in 1991 when he purchased it. Indeed, there was no evidence that was led by the Appellant to show that he continued being in possession of the land after selling the land to the Respondent. However, the period of twelve (12) years had not lapsed between 9<sup>th</sup> August, 1991 when the Agreement of Sale was signed and 27<sup>th</sup> August, 2003 when the suit was filed.

20. In any event, the Appellant in this matter obtained the Title Deed for the suit land in 1998. The Respondent did not produce in evidence the extract of the register for the parcel of land known as Kibauni/Malunda/190 to enable the court to ascertain if the suit land was registered in favour of the Appellant prior to the issuance of the Title Deed on 6<sup>th</sup> April, 1998.

21. It is trite that under Section 38 (1) of the Limitation of Actions Act, a claim for adverse possession can only succeed in respect to land that is registered under the Registration of Titles Act (*repealed*), Registered Land Act (*repealed*), Land Titles Act (*repealed*) or the Land Registration Act. Considering that the only evidence that was placed before the lower court on the issue of registration of the suit land was the Title Deed that was issued to the Appellant on 6<sup>th</sup> April, 1998, it follows that twelve (12) years had not lapsed from the date of issue of the said Title Deed.

22. In the circumstances, I find that the Respondent did not prove his Counter-claim on the issue of having been on the suit land for more than twelve (12) years from the date of registration of the suit land in favour of the Plaintiff. Having found above that the transaction in respect of the suit land required the consent of the Land Control Board, and the Respondent having not proved that he is entitled to the suit land by way of the doctrine of adverse possession, I set aside the Judgment of the learned Magistrate dated 19<sup>th</sup> November, 2007 and substitute it with the following orders:

- a. The Appellant to refund to the Respondent the purchase price of Kshs. 45,000.***
- b. The Appellant to pay interest on the above amount at court rates from 9<sup>th</sup> August, 1991 until payment in full.***
- c. Each party to bear for his/her own costs in respect to this Appeal and in the lower court.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**