



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

CIVIL APPEAL NO. 89 OF 2010

BOARD OF GOVERNORS KISASI

SECONDARYSCHOOL.....APPELLANT/APPLICANT

VERSUS

JOHNSON KITHEKA KATHENGE.....DEFENDANT/RESPONDENT

JUDGMENT

1. This Judgment is in respect to an Appeal from the Judgment of the learned Senior Resident Magistrate, Hon. Elizabeth Osoro, in Kitui PMCC No. 169 of 2005.
2. In the Plaintiff that was filed in the lower court by the Respondent, it was averred that on 28th August, 1980, the Respondent sold a portion of his land measuring approximately ten (10) acres to the Appellant and that the purchase price was Kshs. 500,000 out of which the Appellant paid Kshs. 10,000.
3. According to the Respondent, the balance of the purchase price was to be paid by the Appellant once the funds were available provided that the Respondent is awarded tenders to supply to the Appellant food products and other items that the Appellant required for its operations.
4. It was averred in the Plaintiff that the Respondent's contract to supply to the Appellant with food and other items was rescinded by the Appellant in the year 2004; that the Appellant owes the Respondent the balance of the purchase price being Kshs. 490,000 and that the tender for supply of foodstuffs to the Appellant was a condition precedent to the due performance of the agreement.
5. The Respondent prayed for an order of specific performance of the agreement dated 28th August, 1980 and in the alternative for the Appellant to give vacant possession of the Respondent's land.
6. In its Defence, the Appellant pleaded that the suit property was donated to it by the then County Council of Kitui; that in any event, the suit is time barred and that the Respondent was not given any monopoly to supply to the Appellant with food products and other items.
7. After hearing witnesses, the learned magistrate rendered her Judgment in favour of the Respondent.
8. In the Judgment, the trial court found that the agreement of 28th August, 1980 between the Respondent and the Appellant was continuously renewed until the year 2004 when it was breached; that the Respondent was entitled to recover the balance of the purchase price and that the Respondent should be

paid Kshs. 490,000 by the Appellant.

9. The Appellant has challenged the Judgment of the lower court on four grounds which can be summarized as follows: that the learned magistrate erred by not finding that the claim was time barred; that the learned magistrate erred by relying on a non-admissible document and that the learned magistrate erred by not finding that the Respondent had not explained how it acquired the suit land.

10. This being a first appeal, this court is duty bound to examine the evidence that was adduced in the lower court and arrive at its own conclusion.

11. In his evidence, the Respondent informed the court that his land neighbours the land that the Appellant owns; that he sold to the Appellant a piece of his land so that the Appellant could build more dormitories and that they entered into an agreement of 28th August, 1980.

12. To show that the land he sold to the Appellant was his, PW 1 produced in evidence the Judgment that was delivered in Kitui PMCC No. 159 of 1972.

13. Although the Appellant's advocate objected to the production of the agreement of 28th August, 1980, the court overruled the objection on the basis that "*the document was made by the parties.*"

14. According to PW1, he continued supplying to the Appellant goods until the year 2004 when the then Principal of the Appellant stopped him from doing so.

15. In cross-examination, PW1 stated that it's the Appellant which has the Title Deed for the suit land.

16. PW2 informed the court that he was the Chief of the area in 1980; that he was also a member of the committee of the Appellant when the agreement of 28th August, 1980 was entered into and that the Respondent sold the suit land to the Appellant as indicated in the agreement.

17. Because the School did not have money, PW2 stated that the Respondent was allowed to supply to the Appellant with goods. This is what happened until the year 2004 when he was stopped from supplying the said goods.

18. The other committee member of the Appellant in 1980, PW3, informed the court that the Respondent sold to the Appellant land measuring 10 acres in 1980; that they agreed to give the Respondent the tender to supply to the Appellant goods and that the Respondent has never been paid the balance of the purchase price.

19. The Chairman of the Appellant's Board of Governors, DW1, informed the court that the Appellant's land was registered in the name of Kitui County Council and reserved for Kisasi Secondary School; that a Title Deed was issued to the school on 23rd July, 1990 and that the land never belonged to the Respondent.

20. The headteacher of the Appellant stated that the first Board of Governors of the Appellant was established in the year 1981; that the school did not have any debt as at that time and that during the adjudication process which was done in 1981, no objection was raised.

21. DW2 supported the assertion by DW1 that the first Board of Governors of the Appellant met in 1981 and that he was not aware of the agreement that the Respondent was relying on.

22. The Appeal proceeded by way of written submissions.

23. The Appellant's counsel submitted that the purported Sale Agreement is time barred and that under Section 4(1) of the Limitation of Actions Act, a contractual agreement lapses after six (6) years.

24. The Appellant's counsel submitted that the Respondent did not explain how it acquired the suit land and that the supply of goods by the Respondent to the Appellant was not an acknowledgement of indebtedness.

25. The Respondent's counsel submitted that a cause of action arises upon repudiation of a contract; that the parties herein were performing the contract until the year 2004 when there was breach and that that is when a cause of action arose.

26. The Respondent's counsel finally submitted that the ten (10) acres sold by the Respondent to the Appellant had been the subject of Kitui Land Case No. 159 of 1972; that the land was adjudicated between 1981 and 1990 and that because of the good relationship the Respondent had with the Appellant, the Respondent could not object to the adjudication of the land in favour of the Appellant.

27. In the suit that was filed in the lower court, the Respondent was seeking for an order of specific performance in respect to the Agreement of Sale that was purportedly entered into by the Appellant and the Respondent on 28th August, 1980. In the alternative, the Respondent sought for an order of eviction as against the Appellant from the suit land.

28. The Agreement of 28th August, 1980 was therefore the basis of the Respondent's case in the lower court.

29. Considering that the Respondent was seeking for an order of specific performance in respect to land, the applicable law of limitation of time is not Section 4(1) but Section 7 of the Limitation of Actions Act.

30. Section 7 of the Limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

31. The exclusion of periods of limitation is provided for under Part III of the Act and includes disability, acknowledgement of part payment, fraud, mistake and ignorance of material facts.

32. The case by the Respondent is that the cause of action in this matter arose in the year 2004 when the Appellant stopped him from supplying goods.

33. According to the Respondent, he did not enforce the agreement of August, 1980 because he had been allowed to supply to the Appellant goods upto when the Appellant would settle the balance of the purchase price.

34. The clause that the Respondent relied on to show that the cause of action arose in the year 2004 provides as follows:

“The remaining balance of Kshs. 490,000 (four hundred and ninety thousand only) to be paid later when funds will be available even if it's after many years for there is no money at the time being. On top of this, Johnson Kitheka Kathenge will be given the tender to supply the school with various food products and other items which the school will be requiring until when the balance will be fully paid.”

35. On the face of the Agreement of 28th August, 1980, there was no indication as to when the Appellant was to pay the balance of the purchase price.

36. There is no evidence to show that there was any acknowledgement by the Appellant that it owed the Respondent Kshs. 490,000 or at all or that it made any part payment of the said amount after the purported agreement of 28th August, 1980.

37. The mere fact that the agreement provided that the balance was to be paid later and that the

Respondent was to supply to the Appellant with goods until when the balance of the purchase price was paid did not remove the agreement from the ambit of Section 7 or Section 4 of the Limitation of Actions Act.

38. The Limitation of Actions Act is specific as to when Sections 4 or 7 can be limited.

39. Having not specifically stated when the balance of the purchase price was payable, it follows that the Respondent's right to recover the suit property or the purchase price lapsed after the end of twelve (12) years from 28th August, 1980.

40. The Respondent did not have to wait for more 24 years to claim that he was entitled to the balance of the purchase or his land just because he had a good trading relationship with the Appellant. The law does not countenance such a scenario.

41. In the circumstances, I find and hold that the learned magistrate erred by not finding that the Respondent's suit was time barred.

42. The evidence that was before the lower court showed that the suit property was adjudicated in the year 1981 and a Title Deed in respect to the suit land issued on 23rd July, 1990 in favour of Kitui County Council (*reserved for Kisasi Secondary School*).

43. The Respondent did not object to the process of adjudication of the land in favour of the Appellant or Kitui County Council.

44. The Kitui County Council, on behalf of the Appellant, was identified as the body entitled to the suit land.

45. Consequently, the Respondent cannot claim that all along the land belonged to him and that he is entitled to either Kshs. 490,000 or to the land.

46. The evidence before the trial court could not be used to nullify the Appellant's title because the Title Deed that was issued to the Appellant was not as a result of a transfer but the adjudication process.

47. The Respondent therefore failed to prove its case on the required standards in the lower court.

48. For those reasons, I allow the Appellant's Appeal and set aside the Judgment of the learned magistrate dated 8th June, 2010 and substitute it with an order dismissing the Respondent's suit.

49. The Respondent shall pay the costs of the Appeal and the costs of the suit in the lower court.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE