



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 81 OF 2019

BETWEEN

LYDIAH JENNY KATUKU MUTHUSI

(suing as the Legal Administrator and Personal Representative of the

Estate of Jackson Muthusi Mwano) APPELLANT

AND

CITY CHICKEN & EGGS DEALERS

CO-OPERATIVE LIMITED1ST RESPONDENT

PHYLIS MUGEKI NGUGI 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi

(K. Bor, J.) dated 26th July, 2018

in

E.L.C. No. 1542 of 2013)

JUDGMENT OF THE COURT

This is a first appeal from the Judgment of the **Environment and Land Court (ELC) (Bor, J.)** delivered on 26th July, 2018 where the appellants suit was dismissed. **Rule 29** of the **Court of Appeal Rules** requires us in such an appeal to re-appraise the evidence and to draw our own inferences of facts. It was held, on the mandate of the Court in a first appeal in the case of ***Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123*** that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

We shall go through the record to satisfy ourselves whether the trial court properly reached the correct findings on the evidence produced by the parties in the case and draw our own inferences of facts.

The appellant, **Lydiah Jenny Katuku Muthusi** (suing as the legal and personal representative of the estate of **Jackson Muthusi Mwano**) in the plaint presented before the trial court alleged that her late husband (**Jackson Muthusi Mwano “the deceased”**) had on or about 3rd February, 1981 bought a plot of land known as **Plot No. 118 (L.R. No. 1012/63) (“the suit property”)** measuring 0.5 of an acre situate at Kasarani from a member of the 1st respondent (**City Chicken & Eggs Dealers Cooperative Limited** – the member was named as **Henry Mungai Kiningo**). Further, that the transaction was effected at the 1st respondent’s offices where the deceased paid the whole consideration

of **Ksh.28,000** and transfer fee **Ksh.2000** but that transfer was not effected; that there was amalgamation of plots in lands owned by the 1st respondent and certain changes resulted in plot No. 118 being renumbered Plot No. 20 as per a map made in 1978.

On an unstated date after the death of the deceased the appellant visited the land and found the 2nd respondent (**Phylis Mugeci Ngugi**) on the land where she (the 2nd respondent) had erected a structure. Attempts to acquire the land or have it transferred to her (the appellant) failed and she enumerated various particulars of fraud, negligence and misrepresentation on the part of the 1st respondent. These ranged from failure to keep proper records of its members; failure to transfer the plot of land to the deceased; misrepresentation of records; failing to secure the rights of the deceased; failure to give information on how the 2nd respondent obtained the plot of land, amongst other particulars. The appellant further alleged in the plaint that Plot No. 118 and Plot No. 20 were the same on the ground; that the 2nd respondent had encroached on the same and should be evicted immediately; that the estate of the deceased had suffered colossal damage and for all that it was prayed that a declaration be made that the appellant was the *bona fide* purchaser for value of **“Plot No. 118 cum – Plot No. 20”**; that an order be made directing the lands office to restore and transfer the plot to the estate of the deceased in default the Deputy Registrar of the Court execute the relevant transfer; damages be paid to the appellant; vacant possession and eviction of the 2nd respondent; mesne profits from the date the 2nd respondent “encroached on the plot”; costs of suit and interest or the court give any other relief that it deemed fit to grant.

The claim was denied.

The 1st respondent denied that Plot No. 118 or 20 had been sold stating that it had not sanctioned any sale of the said plots of land. It was also stated that the appellant had not exercised due diligence from records it held of its members. It was alleged in the statement of defence that the appellant was a victim of swindlers; that no plots had been amalgamated; that Plots No. 118 and 20 were different originally owned respectively by one **Ngui Kimonyi and Dr. Njuguna and Mrs. Mary Wambui Njuguna**.

The 2nd respondent in her defence denied that the appellant had capacity to bring the claim. She denied that the deceased had purchased the alleged plot of land stating that Plot No. 20 had been allocated to her late husband Ngugi Mbiru who had purchased it; that upon his death the 1st respondent had transferred the land to her as widow of the said member and she took immediate possession and developed the same and it was subsequently registered as Block 122/85. In taking a defence of limitation the 2nd respondent alleged at paragraph 11 of the defence:

“ 11. Even if the suit premises belonged to the plaintiff, which the 2nd defendant vehemently denies, the plaintiff’s claim against the 2nd defendant would be statute-barred, and the 2nd defendant would have acquired title to the same by adverse possession, having been in open and uninterrupted possession of the same for a period of more than twelve years.”

She prayed that the suit be dismissed with costs.

In testimony before the trial Judge the appellant stated that her husband (the deceased) died in the year 1995; he had purchased the suit property but had then left the country (presumably with his family) as he worked out of the country; that the suit property was L.R. No. 118 purchased from the 1st respondent and that she had erected a fence around the suit property which (suit property) had been re-numbered to No. 20 after plots were amalgamated. Further, that she visited the suit land and found it encroached by the 2nd respondent; a report to police did not resolve the issue thus the suit before the trial court. In cross-examination, the appellant, on being shown a map of the area confirmed that Plots No. 118 and No. 20 were different but insisted that Plot No. 118 had been renumbered Plot No. 20.

John Dominic Obel, a licensed surveyor, was called as a witness by the appellant. He testified that the 1st respondent owned 3 parcels of land in Kasarani, one of which was L.R. No. 1012/63 on which Plot No. 118 was situate. According to him there was amalgamation of plots and:

“Plot 118 became Plot 20 and finally Parcel No. 85”.

Richard Mutisya Muiva was also called as a witness by the appellant. He was present when an agreement for sale between the appellant and her husband on the one hand and **Henry Mungai** on the other was signed at the 1st respondent’s offices. He was a witness to the agreement (this agreement was expunged from the record during the proceedings at ELC).

Hannah Peter Kioi, a member of the 1st respondent testified on behalf of the appellant that the 1st respondent would issue metal plates to members which would indicate the plot owned by a member. For a member to sell a plot he should surrender the metal plate to the purchaser, sign an agreement and obtain consent of the 1st respondent for transaction.

Zachariah Maina Wamaita was Chairman of 1st respondent. He knew Ngugi Mburu who owned Plot No. 20 which, upon his death was transferred to his widow, the 2nd respondent. In cross-examination he testified that Plot Nos. 20 and 118 were different. According to him Henry Mungai Kiningo (this is the man who entered into agreement with the deceased) had three plots – Nos. 21, 178 and 278. According to his records Plot No. 118 belonged to one Dr. Njuguna while Plot No. 20 belonged to Ngugi Mburu.

The 2nd respondent testified that she was the widow of the deceased and was allocated Plot No. 20 by the 1st respondent after the death of her husband. She fenced the suit property and settled on the same after developing it.

That was the case made by all sides and after evaluation the Judge dismissed the appellant’s case and it is those findings that precipitated this appeal through Memorandum of Appeal where 18 grounds of appeal are taken, some of which are repetitive, argumentative and not drawn in the concise way grounds of appeal should be drawn. The Judge’s findings are attacked on the basis that the evidence presented had proved the appellant’s case; that the Judge did not consider all issues put before her in determining the case; that the Judge should have found that the 2nd respondent had encroached on the land by trespassing on the same; that the Judge should have found that the deceased was not a member of the 1st respondent; that the Judge should have found that amalgamation of 3 lands owned by the 1st respondent had led to re-

numbering of plots; that the finding that the suit was time barred was wrong. It is proposed that we set aside the Judgment of the trial Judge; and prayers (b) and (c) appear curious. It is prayed:

“(b) The prayers sought in the suit by the Appellant be granted and the Defendants ordered to vacate the suit property.

(c) The 1st Defendant be ordered to surrender the documents for Plot No. 20 (now Block 122/85) to allow the Appellant easy processing of documentation of title with the Ministry of Lands, Housing and

Urban Planning.”

When the appeal came up for hearing on 23rd February, 2021 virtually in accordance with COVID-19 rules the appellant was represented by learned counsel **Mr. Allan Muga** who was assisted by learned counsel **Mr. Omamo**. The 1st respondent was represented by learned counsel **Mr. Kassim** while learned counsel **Mrs. Kuria** appeared for the 2nd respondent. All parties had filed written submissions and what remained was a highlight of the same.

Mr. Muga referred to a letter dated 3rd February, 1981 (he called it “Deed of Sale”) appearing at page 34 of the record (this document was expunged at the trial) and submitted that Plot No. 118 had been sold by its owner to the deceased. Further, that the said Plot No. 118 was renumbered and became Plot No. 20. On the issue of time limitation counsel for the appellant submitted that the Judge was wrong to hold that the suit was time barred.

In supporting the Judgment of the ELC counsel for the 1st respondent submitted that the suit was time barred by virtue of **Section 7 of the Limitations of Actions Act (Cap 22 Laws of Kenya)**. According to counsel the deceased had returned back home in 1986 but did not take any action against the appellant.

Mrs. Kuria for the 2nd respondent submitted that right to recover the land belonged to the deceased who did not take any action when the 2nd respondent entered and occupied the land in 1991. According to counsel the 2nd respondent was protected by **Section 26 of Cap 22** as a purchaser for valuable consideration.

In a brief rejoinder Mr. Muga submitted that the trespass by the 2nd respondent did not happen during the lifetime of the deceased.

We have considered the whole record, submissions made and the law.

The issues that we find relevant for our consideration are whether the deceased acquired Plot No. 118 from the parcel of land owned by the 1st respondent; whether Plot No. 118 was renumbered and became Plot No. 20. The other issue is whether the suit was time barred.

It was the appellant’s case supported by her witness that her late husband had purchased a 0.5 acre piece of land (Plot No. 118) on 3rd February, 1981 from a larger parcel owned by the 1st respondent and that her family had then left the country and, during their absence, there was amalgamation of land and Plot No. 118 became Plot No. 20. When she visited the land after the death of the deceased she found a trespasser, the 2nd respondent, who had erected a structure on the land. There was the testimony of the surveyor (Mr. Obel) that there was amalgamation of lands leading to renumbering of plots.

That version was disputed by the Chairman of the 1st respondent who produced before the trial Judge records showing that there was no amalgamation of lands at all. The witness testified that Plots No. 20 and 118 were different and he gave names of registered owners, Plot 20 having been registered in the name of the 2nd respondent’s husband, and upon his demise, transferred to the 2nd respondent.

The trial Judge on evaluating the evidence found that the appellant had failed to prove that Plot No. 118 which her late husband had purchased was renumbered Plot No. 20. The Judge also found that the deceased, after returning from abroad, had failed to establish which plot belonged to him after re-balloting of plots as had been ordered by the Ministry of Cooperative Development. Reballoting had been done in 1991.

Upon evaluating and considering the evidence on record we are of the same view as that of the trial Judge. The appellant’s case that her late husband bought Plot No. 118 in 1981 and that the same was renumbered to Plot No. 20 was not established to the required standard or at all. Records kept by the 1st respondent were produced into evidence and ownership of Plot No. 20 was shown to have belonged to the 2nd respondent’s husband. The piece of land was transferred to the 2nd respondent upon the death of her husband. On the two issues, therefore – whether the deceased purchased Plot No. 118 and whether Plot No. 118 was renumbered to Plot No. 20 we return a negative answer. The appellant had a duty to prove those issues by adduction of evidence which we find she did not do so.

On the issue of whether the suit was time barred the Judge found that the same was time barred having been filed more than 12 years from the date the cause of action arose. (Determination of this issue is academic in view of our findings above).

The facts were that the appellant alleged that they purchased the piece of land in 1981, they relocated to another country and returned home in 1986. The deceased (husband of the 2nd respondent) died in 1989 and the plot which was in his name was transferred to her that year and she moved into the land and developed it.

The plaint filed at the High Court of Kenya at Nairobi (Milimani Law Courts) is dated 19th December, 2013.

By **Section 7 of Cap 22** an action to recover land may not be brought by any person after the end of twelve years from the date on which the right of action accrued to him, or if it first accrued to another person through whom he claims, to that person.

The period between 1989 (when the 2nd respondent entered and developed Plot No. 2) and the year 2013 (when suit was filed) is about 24 years and the action was statute barred, filed out of the twelve years required by **Section 7 of Cap 22**.

The appeal fails and is dismissed with cost to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR