IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, KARANJA & OKWENGU, JJ.A.)

CIVIL APPEAL NO. 2 OF 2018

BETWEEN

ANNE JEPKEMBOI NGENY.....APPELLANT

AND

JOSEPH TIREITO.....1ST RESPONDENT

JACOB KIPSUGUT ARAP LAGAT.....2ND RESPONDENT

(An Appeal from the Judgment of the Environment & Land Court at Eldoret (S. Munyao, J.) delivered on 26th February, 2014

in

E.L.C. No. 441 of 2012)

****

JUDGMENT OF THE COURT

1. **Joseph Tireito** (the 1st respondent) was the plaintiff in **Eldoret ELC Case No. 441 of 2012 (formerly HCC N0 85 OF 2012)** filed by way of plaint dated 3rd June, 1999 against Jacob Kipsugut Arap Lagat (the 2nd respondent), which plaint was subsequently amended on 4th September, 2001 to join the appellant herein as a party. The 1st respondent specifically sought for;

> *i. A permanent Injunction to restrain the defendant his servants and/ or agents from entering, trespassing, tilling, cutting trees or in any other way dealing with the Plaintiff's quarter undivided share in LR. No. 779/359 measuring 26 and a half acres;*
>
> *ii. The sum of Kshs. 40,000/- being the value of trees damaged and damages for trespass;*
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> *iii. Costs of the suit;*
>
> *iv. Interest;*
>
> *v. Any other or further relief that this Honourable Court may deem fit to grant;*

2. It was the 1st respondent's case that in May 1971 he purchased the 2nd respondent's share in Land Parcel LR. No. 779/339 for Kshs. 12,000. This share was said to be one quarter of the undivided share in the whole parcel measuring 106 acres, which share according to the 1st respondent measured 26.5 acres; that he attended the Land Control Board with the 2nd respondent and consent for the transaction was issued; that after paying the 2nd respondent, he took possession of the suit property and the 2nd respondent moved to Kitale; that he remained in quiet possession until May 1999 when both the appellant and the 2nd respondent came onto his land claiming 2.5 acres of his land.

3. The 2nd respondent herein filed a defense whereby he conceded having entered into an agreement with the 1st respondent for the sale of 24 acres but that the 1st respondent only paid Kshs. 6,000. He denied having gone to the Land Control Board and asserted that the 1st respondent having paid half the amount, was entitled to half the portion, 12 acres. He denied cutting any trees or trespassing on the 1st respondent's portion and prayed that the suit to be dismissed.

4. The appellant who was the 2nd defendant in the suit also filed a defense denying having entered the suit land with an intention to claim 2.5 acres out of it. She denied cutting trees, or interfering with the 1st respondent's quiet possession and stated that if they were cut, then they were not on the 1st respondent's portion; that the 1st respondent had always been opposed to sub-division of the suit land and that the 1st respondent illegally occupied a house which was sold to her by the 2nd respondent. She prayed that the suit be dismissed.

5. It is noteworthy, that during the proceedings the parties entered into a consent settling part of the 1st respondent's claim where judgment was entered for the undisputed 12 acres out of the suit land. Also, the appellant and the 2nd respondent proceeded to sub divide the remaining property and got title deeds registered in their respective names during the pendency of the proceedings.

6. During the hearing, the 1st respondent testified that the whole suit land comprised of 106 acres and he purchased a quarter of it (26.5 acres) from the 2nd respondent in 1971 at Kshs. 12,000 together with all developments thereon (3 houses and a store). He referred to a sale agreement but did not produce it; that they went to the Land Control Board on 27th July, 1971 and he has lived on the land since then.

7. He further testified that the 2nd respondent moved to Kitale but came back after 30 years claiming he was not paid the full purchase price; that as for the appellant, she forcefully moved into his portion of the suit land and took possession of 2.5 acres (in which portion the houses are situated) in 1999.

That during the proceedings and in defiance of an order of injunction, the appellant and the 2nd respondent sub-divided the suit property and had them registered in their names (2nd respondent – 24 acres and appellant 2.5 acres).

8. The 1st respondent called as a witness, an official from the Land Control Board who produced a register of the Land Control Board showing the particular entry of the 1st respondent and the 2nd respondent and a Letter of consent from the Land Control Board.

9. The 2nd respondent testified that originally, the suit land was purchased by 4 people (2nd respondent, Paul arap Lelmenit, Jonah Magoi and Arap Saina) from a white settler in 1965. Paul arap Lelmenit was the deceased husband of the appellant. He denied going to the Land Control Board but admitted there was a sale agreement; that he was a registered owner of 9.94 acres curved out of the suit land.

10. He further testified that he sold to the appellant houses on the property for Kshs. 40,000; that as for the 4 original owners, the sub division was based on individual's contribution and the 2nd respondent was thus entitled to 24.5 acres; that one of the owners was entitled to 53 acres (Kiprotich Ngeny) while himself and Magoi were to divide the rest among themselves.

11. The appellant testified that she was aware that the suit land was originally bought by 4 people, although the letter of consent at the Lands Board only had 3 names; that the name of the 4th partner was silent but her husband was entitled to 29 acres, Kwambai Saina was entitled to 25 acres; that originally, when the land was sub – divided, there was a house that fell on the portion for the 2nd respondent who sold the same to her for Kshs. 40,000 on 20th May, 2000.

12. She further testified that the 1st respondent now occupied the portion registered in the name of the 2nd respondent; that the 1st respondent's sons occupied her house on the 2nd respondent's portion and that the 2nd respondent's share was 24 acres not 26.5 acres.

13. The Court framed the issues as follows;

a. Whether there was a sale agreement between the appellant and the 1st respondent in 1971 and what were its' terms;

b. Whether the 2nd respondent sold to the 1st respondent a quarter of the original suit land in 1971;

c. What did the quarter portion consist of, in terms of acreage;

d. What is the share of the appellant in the original suit land;

e. Whether the 1st respondent is entitled to ownership of the 26.5 acres of the original suit land;

f. If answer to 5, is in the affirmative, what should happen to the new titles owned by the appellant and the 2nd respondent;

14. The learned Judge in his judgment made the following findings of fact: -

(i) That there was a Sale Agreement between the 1st and 2nd respondents;

(ii) That the Purchase price was not in dispute;

(iii) That the terms of the agreement, or at least part of the terms of the agreement, were discernible from the uncontested facts and the consent to the transaction issued by the Land Control Board.

He noted that;

"Having looked at the register of the Land Control Board and the Letter of Consent issued; the register showed an entry made on 4 June 1971; the nature of the transaction was "sale of 1/4 undivided share" of LR No. 779/359; the whole land was noted to be 42.9 hectares; the purchase price was noted to be Shs. 12,000/= and the register shows that the transaction was approved."

(iv) That the 1st respondent attended the Land Board Meeting;

(v) The transaction was for 1/4 undivided share; that is nothing less than 1/4 of 42.9 hectares which was equivalent to about 10.725 hectares which is very slightly above 26.5 acres.

(vi) That the 1st respondent was entitled to 26.5 acres and not 24 acres."

15. The Judge ultimately held, *inter alia*;

i. That there was a sale agreement between the respondent and the 1st appellant, as the latter did not expressly deny the same; having looked at the register of the land control board with an entry made on 4th June, 1971 on the sale of ¼ undivided share of LR. 779/359;

ii. That the suit was within time; Counsel for appellants had said the suit was time barred the suit land having been bought in 1971 but judge held that the cause of action arose in 1999. That instead it was the appellant who was time barred from claiming the Kshs. 6,000 he alleged was unpaid as the purchase price. The claim ought to have been lodged within 6 years of 1971;

iii. The properties having already been registered as 2nd respondent – 24 acres and 2nd appellant 2.5 acres, the appellant was entitled to 2.5 acres less than what is comprised of in her title;

iv. The 1st respondent was entitled to the 24 acres currently registered in the name of the appellant and 2.5 acres in the name of the 2nd respondent; 26.5 acres in total;

v. The titles of the appellant and 2nd respondent be cancelled; title of the 2nd respondent be transferred to the respondent and 2.5 acres be excised from the appellant's portion.

16. Aggrieved by the above findings of the trial court, the appellant filed a Memorandum of appeal dated 20th July, 2018 raising 26 grounds largely based on the ground that the learned Judge erred in holding that the 1st respondent was entitled to 26.5 acres of the suit land contrary to the evidence on record.

17. The appellant filed submissions and a list of authorities dated 20th January, 2021. She has condensed the issues for determination as follows; whether the land could be sold without a written contract, whether a land transaction involving agricultural land can be considered valid without a Land Board Consent to transfer, whether the 1st Respondent was entitled to the award of 26.5 acres or the 24 acres the 2nd respondent and original owner sold to him and lastly, whether Limitation of time applied to the 1st respondent's suit.

18. On whether the land could be sold without a written contract, the appellant submits that the sale agreement never existed and if at all it did, it was not valid for non – compliance with the provisions of the Law of Contract Act, CAP 23 of the Laws of Kenya. Further that the agreement was unwritten, unsigned and unattested hence an egregious infraction of the statutory requirement as to sale agreements and it could therefore not confer any legal rights.

19. On whether a land transaction involving agricultural land can be considered valid without a Land Board Consent to transfer, the appellant submits that there was no land Board consent to transfer the suit land to the 1st respondent and that being the case the transaction could not stand by operation of the law.

20. On whether the 1st respondent was entitled to the award of 26.5 acres or the 24 acres, the appellant submits that had the 1st respondent proved the existence of the sale agreement, he would have been entitled only to 24 acres and not 26.5; that it came out in evidence that the 2nd respondent sold 24 acres to the 1st respondent for Kshs. 12,000 though he only managed to pay Kshs. 6,000; that the 1st respondent never owned the appellant's parcel of 2.5 acres as claimed. On limitation of time, the appellant submits that the 1st respondent claims to have acquired interest in 1971 yet instituted the suit in 1991 (28 years later) thus the claim by the 1st respondent was time barred and the court ought not to have entertained it.

21. The 1st respondent also filed his submissions. On a preliminary point, he informs the Court that the 2nd respondent died after judgment was delivered in 2014; that the 2nd respondent had filed a notice of appeal but he did not file any record of appeal thus his appeal abated; that the current appeal

thus deals with the 2.5 acres as claimed by the appellant; that the 2nd respondent not having appealed, the portion claimed by him remains revoked as per the judgment of the superior court. There was nonetheless no evidence pertaining to the death of the 2nd respondent and so we shall determine the issue of the 24 acres on merit.

22. The 1st respondent also submits that the appeal is incompetent as judgment was delivered on 26th February, 2014, notice of appeal filed on 10th March, 2014 without leave of court and the record of appeal filed 4 years later; that the appeal remains incompetent and should be

struck out for being time barred or in the alternative, the appeal be dismissed for being devoid of merit.

23. Before delving into the appeal, the Court will deal with the preliminary issues raised by the 1st respondent. In the case of **Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR,** the Court of Appeal held: -

> "*A ruling in favour of sustaining the appeal will therefore be in line with the overriding objective principle because if the appeal is struck out on account of incompetence, the striking out order will not finally determine the issues in controversy as between the parties. It will simply restore the parties to the pre-appeal stage before the alleged offending notice of appeal was filed. The net effect of this restoration will be that the appellant will be at liberty to reinitiate the appellate process afresh…Such an action is likely to lead to a delay in the disposal of the real issues in controversy as between the appellant and the respondent. There will also be considerable costs to be borne by both parties both for these proceedings and the proceedings to be reinitiated. This will also result in the clogging of the justice system as the reinitiated appeal will have to be re-presented to this same Court based on the same set of facts and as soon as it is presented it will start competing for time for disposal…. It is our considered opinion that, such a move will not guarantee justice and fairness to the parties on equal arms (footing) …"*

24. Similarly, in the instant case it will not serve justice to the parties if the appeal is to be dismissed at this stage. We also hold the view that the application to strike out the appeal ought to have been raised earlier and preferably under the relevant provisions of the Court of appeal Rules so that the affidavit in support of the application would explicitly set out the time lines which had been allegedly flouted. This would also have availed the appellant an opportunity to respond substantively. We shall therefore determine this appeal on merit.

25. From a careful perusal of the record of appeal, parties' submissions and the cited authorities the legal issues arising for determination can be discerned to be: ***whether the land could be sold without a written contract, whether a land transaction involving agricultural land can be considered valid without a Land Board Consent to transfer, whether the 1st Respondent was entitled to the award of 26.5 acres or the 24 acres and lastly, whether Limitation of time applied to the 1st respondent's suit.***

26. On whether the land could be sold without a written contract, the Judge held that indeed there existed a sale agreement. But assuming for a moment that the appellant's assertion is true, that there was no sale agreement then what would be the fate of the transaction?

27. In **Civil Appeal Number 22 of 2013**, **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR,** this Court held;

> ***"Section 3(3)** of the **Law of Contract Act** provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. **Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003**. …. Prior to the amendment of **Section 3(3)** of the **Law of Contract Act** in 2003, the subsection read as follows: -*
>
> *(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;*
>
> ***Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-***
>
> ***(1) Has in part performance of the contract taken possession of the property or any part thereof; or***
>
> ***(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."*** (Emphasis added)

28. Similarly, in the instant case even if there was no sale agreement, the 1st respondent only had to satisfy the Court that he had been in possession, which he did as the Court found that he had been in occupation of the suit land from the year 1971 and still remained on the suit land throughout the proceedings of this matter. We note however that although no sale agreement was exhibited in court, the 2nd respondent admitted at paragraph 2 of his statement of defence that he had entered into an agreement with the 1st respondent although according to him the agreement was for 24 acres and not 26.5 as claimed by the 1st respondent.

29. On the issue of whether there was consent from the Land Control Board, the learned Judge after considering the evidence adduced by the witness from the ministry of agriculture and scrutinizing the register and the letter of consent on record was satisfied that the said consent was authentic. The Learned Judge specifically held; -

> "*I have looked at the register of the Land Control Board and the letter of consent issued…. The register shows that the transaction was approved. Although the 1st defendant denied having attended any land control*

board, the facts show otherwise ***and I have no reason to doubt the register of the Land Control Board."***

On our part, in absence of any other evidence adduced by the 2nd appellant to controvert the authenticity of the said consent, we hold that the said documents were genuine and authentic. The learned Judge cannot therefore be faulted for arriving at the above finding.

30. On whether the learned Judge misdirected himself in holding that the 1st respondent was entitled to the award of 26.5 acres or the 24 acres, the Judge expressly gave his reasons why he so found. The Judge specifically held;

> "*In his evidence, the 1st defendant testified that the husband to the 2nd defendant got 53 acres and the other two partners shared the rest in equal parts. This is exactly what he stated in his evidence in cross-examination. It is not disputed that the original land in terms of acreage was about 106 acres, give or take. If the husband to the 2nd defendant got 53 acres this left 53 acres. Simple arithmetic will show that if you sub-divide 53 acres equally into two, you get 26.5 acres. Moreover, if the claim of the 1st defendant is that he only had 24 acres, and his title now reads 24 acres, where then did he get the additional land, which had the houses, to sell to the 2nd defendant? The 2nd defendant testified that her title comprises of what her husband was entitled to and the addition that the 1st defendant sold to her. The only logical conclusion is that this extra land is the 2.5 acres that the plaintiff is complaining of, and which is now comprised in the new title issued to the 2nd defendant."*

We agree with the learned Judge on the above finding.

31. The Court has noted from the record that the superior court had issued an Order dated 14th February, 2003 pursuant to a Ruling dated 13th June, 2003 temporarily restraining the appellant and 2nd respondent, jointly and severally from sub – dividing or in any manner dealing with the suit property. That notwithstanding, the two went ahead and transferred the properties in question into their names during pendency of the suit. This brings to the fore the doctrine of *lis pendens*, which we shall now address briefly.

32. In **Civil Appeal Number 44 of 2014, Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR,** the Court address the issue of *lis pendens* as follows;

> "***Black's Law Dictionary 9th edition****, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.*
>
> *Lis pendens is a common law principle that was enacted into statute by* ***section 52 Indian Transfer of Property Act (ITPA)****-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in* ***Bellamy vs Sabine [1857]*** *1 De J 566 held as follows:-*
>
> ***"It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be***
>
> ***brought to a successful determination, if alienation*** *pendente lite* ***were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."***

In the case of ***Mawji vs US International University & another*** ***[1976] KLR 185,*** *Madan, J.A. stated thus:-*

> "***The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other…"***

33. The actions of the appellant and the 2nd respondent of proceeding to alienate the property and having it registered in their names during the pendency of the litigation process, ran afoul of the doctrine of *lis pendens* and was also tantamount to contempt of court.

34. The appellant in her memorandum of appeal had put forth a ground that the learned Judge erred in granting reliefs that were not specifically pleaded or proved. The appellant was referring to the orders issued by the superior court to have the new titles cancelled and the suit property reverting back to the 1st respondent. The appellant having gone against the *lis pendens* doctrine, the court had to ensure justice is served by issuing those orders. The appellant and the 2nd respondent were trying to steal a match on the 1st respondent by disobeying court orders and hoping the court would turn a blind eye. The learned Judge properly exercised his discretion in the manner that he did. Under the circumstances, the learned Judge cannot be faulted for cancelling the Title deeds and ordering the retransfer of the properties to the 1st respondent.

35. On whether Limitation of time applied to the 1st respondent's suit, the appellant submitted that the 1st respondent claimed to have

acquired interest in 1971 yet instituted the suit in 1991 (28 years later) thus the claim by the 1st respondent was time barred and the court ought not to have entertained it.

36. The critical question to ask, is this: What is a cause of action and when does it arise in a claim for recovery of land? More succinctly put, when did the 1st respondent become entitled to complain or obtain a remedy?

37. In the Court of Appeal case of **Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR** Waki JA. held that,

> ***"A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."***

That definition was given by Pearson J. in the case of ***Drummond Jackson vs Britain Medical Association (1970) 2 WLR 688 at pg 616.*** *In an earlier case,* ***Read vs Brown (1889), 22 QBD 128,*** *Lord Esher, M.R. had defined it as: -*

> ***"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court."***
>
> *Lord Diplock, for his part in* ***Letang vs Cooper [1964] 2 All ER 929*** *at 934 rendered the following definition: -*
>
> ***"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."***

38. The 1st respondent in his plaint averred that he had un-interrupted possession, use and occupation of the suit property from 1971 until May 1999 when the 2nd respondent unlawfully trespassed on the said land with the intention of reclaiming 2.5 acres of the suit property.

39. This reveals that the cause of action arose as against the 2nd respondent on May 1999 and not in the year 1971. The action was therefore not statute barred as the 1st respondent had 12 years from the year 1999. Having filed suit within the same year, the suit was filed well within time.

45. In sum, from our analytical synthesis and re-evaluation of the entire evidence adduced before the trial court, we come to the conclusion that this appeal is totally devoid of merit. Accordingly, we dismiss it with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR