



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KOOME, J. MOHAMMED & KANTAL, J.J.A)

CIVIL APPEAL NO 112 OF 2018

BETWEEN

THOMAS KIMUTAI BIWOTT.....1ST APPELLANT

JOSIAH KIMBUR KIBIAS.....2ND APPELLANT

AND

JOSEPH NDALAYA MUYESU.....RESPONDENT

(An appeal from the Judgment of the Environment and Land Court (Odeny, J.) delivered on the 11th July 2018 in ELC Appeal No 8 of 2014)

JUDGMENT OF THE COURT

Background

1. **Joseph Ndayala Muyesu** (the respondent) was the plaintiff before the Chief Magistrate's Court in Eldoret. He sued **Thomas Kimutai Bett** (the 1st appellant) and **Josiah Kimebur Kibias** (the 2nd appellant) alleging that in 1997 he entered into an agreement with the appellants where it was agreed that he would transfer to the 1st appellant his parcel of land known as **Land Parcel Uasin Gishu/Kahungura/278** measuring five (5) acres, and in exchange, he was to acquire ownership of a piece of land known as **LR No Uasin Gishu/Illulla Scheme/126** (the suit property) which was registered in the name of the 2nd appellant.

2. The respondent claimed that further to this agreement, on 5th June 1997, he made an application to the Anaibkoi Land Control Board for consent to transfer **Land Parcel Uasin Gishu/Kahungura/278** to the 2nd appellant by way of exchange. A subsequent sale of land agreement was entered into between the 1st and 2nd appellants, whereupon the 1st appellant agreed to buy **Land Parcel Uasin Gishu/Kahungura/278** and paid the 2nd appellant the agreed purchase price. Land Control Board consent was granted to the 1st appellant vide min 460/97(44). Pursuant to this, the respondent transferred **Land Parcel Uasin Gishu/Kahungura/278** to the 1st appellant, and the latter took immediate possession of it, and started developing it. However, the respondent alleged that the 2nd appellant, in collusion with the 1st appellant, refused to sign the requisite documentation to facilitate the transfer of the suit property to him.

3. As a result, the respondent claimed that the appellants acted in breach of the agreement for the exchange of land, and failed to honour the mutual agreement to give the respondent vacant possession of the suit property. The respondent therefore sought an order of specific performance being an exchange of land in respect of the suit property measuring 5 acres, mesne profits for 10 years and costs of the suit.

4. The appellants filed a joint defence in which they denied having entered into any agreement with the respondent, stating that any such agreement between the parties would have been void as there was no consent of the Land Control Board. They alleged further that the suit was bad in law for being time barred, and that any such agreement, if it did exist, would be void for not being in writing.

5. After receiving oral evidence, the trial court determined that there was no consent from the Land Control Board to transfer the suit property to the respondent, and therefore held that the respondent had failed to prove that there was indeed an agreement to transfer the suit property to him. The trial court went on to find that the action was founded on contract, and that since the contract was entered into in or about 1997, and that since there was no indication that the respondent had sought leave to institute the suit out of time, the suit was time barred as at the time it was filed. The suit was therefore dismissed with costs to the appellants.

6. The respondent was aggrieved with this decision. He filed a first appeal before the Environment and Land Court (ELC). That court set out the issues for determination as being whether the suit was time barred; whether the transaction was based on contract law or land law; and

whether the agreement between the parties was void for lack of consent from the Land Control Board as required by law in any dealings with respect to agricultural land.

7. The first appellate court (**Odeny, J.**) held that due to the fact that the parties had entered into an agreement for the exchange of land, this made the entire transaction a land transaction. This meant that the suit was not time barred. The first appellate court then considered the effect of the lack of consent on the agreement to transfer the suit property, and relying on the decision of this Court in **Willy Kimutai Kitilit v Michael Kibet (2018) eKLR** held that the lack of consent of the Land Control Board would not preclude the Court from giving effect to the equitable principles, including that of constructive trust.

8. The 1st appellate court therefore found that the trial court had erred in failing to consider all the issues at hand, including the fact that the 1st appellant had admitted to taking possession of the suit property without showing what the respondent had received in exchange. In view of this, the 1st appellate court allowed the appeal with costs, giving judgment in terms of the plaint.

9. The appellants are aggrieved with this decision and filed this second appeal in which they set out various grounds of appeal. The appellants contend that the learned Judge misdirected herself on the law in: finding that the subject matter of the transaction was land, and not contract; failing to consider the effect of limitation as provided in law; treating the application by the respondent to the Land Control Board as a contract between the respondent and the 2nd appellant despite the fact that the 2nd appellant did not sign the application for Land Control Board consent and was not a party to it; and failing to consider that there was in place a binding agreement between the 2nd appellant and the respondent, whose contents were not challenged. For these reasons, the appellants would have us allow the appeal and set aside the decision of the 1st appellate court.

Submissions by Counsel

10. The parties filed written submissions which were highlighted orally before us. **Mr. Tororei**, learned counsel for the appellants, submitted that the first appellate court misdirected itself in substance and the law. First, that the court erred in finding that there was an oral agreement for the exchange of land despite the fact that it is a legal requirement that an agreement for the sale of land be reduced into writing. In counsel's view, there was no such written agreement before the first appellate court, which instead anchored its decision on the application for consent of the Land Control Board. The 2nd appellant was not a party to the transaction as the 1st appellant and the respondent were the parties who executed the application for Land Control Board consent. In view of this, counsel urged us to find that there was no binding agreement between the 2nd appellant and the respondent.

11. **Mr. Tororei** further submitted that the 1st appellate court erred in finding that the limitation period had not been breached as it was in clear contradiction of the evidence that was borne out by the proceedings in the trial court. Counsel submitted that the evidence adduced demonstrated that there was a contractual agreement between the 2nd appellant and the respondent that had been reduced into writing and the object of that agreement was to effect an exchange of 5 acres of the respondent's property with 1¼ acres of the suit property. Counsel submitted that by failing to take this into account, the trial court fell into a fundamental error.

12. For these reasons, **Mr. Tororei** argued that the analysis of the 1st appellate court could not be supported by the evidence on record and urged that we set it aside, and instead uphold the judgment of the trial court.

13. **Ms. Kibichy** learned counsel for the respondent, opposed the appeal and submitted that there was no requirement for a written agreement between the parties as **Section 3** of the **Law of Contract Act** which was subsequently amended with the effect that the requirement that all transactions be in writing came into force in 2003. Counsel argued that the transaction between the parties was entered into in 1997 and since the law can not apply retrospectively, the fact that there was an oral agreement for the exchange of land between the parties means that the agreement was enforceable.

14. On the issue of the limitation of time, counsel submitted that this question had been the subject of a preliminary objection that was raised before the trial court, prior to hearing of the main suit. Counsel submitted that the preliminary objection was heard and dismissed by the trial court. Counsel therefore urged that the ruling having not been appealed from by the appellants, it must now rest.

15. Counsel's final submission was that the agreement between the parties was enforceable as against the 2nd appellant even though he was not a party to the transaction before the Land Control Board as the evidence adduced showed that the 2nd appellant sold **Land Parcel Uasin Gishu/Kahungura/278** to the 1st appellant, and based on this, the respondent was to transfer **Land Parcel Uasin Gishu/Kahungura/278** to the 1st appellant and the 2nd appellant was to transfer the suit property to the respondent. Counsel submitted that at no point was it ever contested that the suit property was to have been transferred to the respondent, and as such, the 1st appellate court did not err in finding the sale agreement enforceable against the 2nd appellant. Counsel urged us to dismiss the appeal with costs.

Determination

16. We have considered the record, the grounds in support of the appeal, the submissions filed by the parties, the authorities cited and the law. This is a second appeal. In **Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR** this Court put it succinctly in the

following words:

“In a second appeal, however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

17. The first issue of law raised by the appellants is the finding by the 1st appellate court that the transaction between the parties was based

on a land transaction, and not a contract as claimed by the appellants. The evidence on record shows that the parties, 1st appellant and the respondent entered into an agreement for the exchange of parcels of land by and between them. As pointed out by **Ms Kibichy**, the evidence on record bears out the fact that by agreement, the 2nd appellant and the respondent were to exchange **Uasin Gishu/Kahungura/278** which was owned by the respondent and the suit property which was owned by the 2nd appellant.

Further, the 2nd appellant directed the respondent to transfer **Uasin Gishu/Kahungura/278** measuring **5 acres** to the 1st appellant and in exchange the 2nd appellant would transfer the suit property, measuring 5 acres to the respondent.

18. Land Control Board consent to transfer in these terms was given to the respondent to transfer his piece of land (**Uasin Gishu/Kahungura/278**) to the 1st appellant. It is clear, and on this we agree with the 1st appellate court, that the transaction was based on land, and therefore was a land transaction. That being the case the strictures of limitation of actions that would apply fall under **Section 7 of the Limitation of Actions Act**, which provides that:

“An action may not be brought by any person to recover land after the end of twelve 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.”

19. This being the case, the suit was not time barred as it was filed within 12 years of the agreement between the parties. This attack on the judgment of the first appellate court therefore fails.

20. This leads us to the second issue of law in this appeal, which is that the appellants claimed that the transaction was void as it was not reduced into writing as required under **Section 3(3) of the Law of Contract Act**. The transaction between the parties could not have been subject to this provision seeing as it was entered into in 1997, while the requirement on written contracts came into effect through an amendment entered into through the **Statute Laws (Amendment) Act** which came into effect on 4th June, 2002. Nothing therefore turns on the appellants’ submission that the contract for exchange of land was void for not being in writing. This ground of appeal therefore fails.

21. The third issue raised by the appellants concerns the manner in which the 1st appellate court considered the evidence. Our jurisdiction in a second appeal includes considering whether or not the first appellate court properly addressed itself to its duty, as the

“failure to re-evaluate or properly re-evaluate the evidence on record is a legal point for consideration in a second appeal”. See ***Faulu Kenya Dtm Limited v James Simatei Kendagor [2016] eKLR (Civil Appeal 216 of 2013)***.

22. The appellant’s submission is that the 1st appellate court failed to consider a relevant issue, which is that the agreement to transfer was for a portion of only $\frac{3}{4}$ acre of the suit property, and not five (5) acres as indicated. We have considered this line of argument alongside the evidence that was adduced before the trial court. The 2nd appellant claimed that he was to transfer only $\frac{3}{4}$ of the subject property and one (1) acre of a separate property which he owned, to the respondent. This was considered by the trial court as well as the 1st appellate court, but it appears that neither court found this to be credible.

23. It is the appellant’s contention that the 1st appellate court relied on extraneous evidence to find that the whole of the suit property was to be transferred, but it is apparent to us that the 1st appellate court considered the application for consent before the Land Control Board in reaching the conclusion that the exchange was for the entire parcel of the suit property. The application for Land Control Board consent was for the exchange of the parcel known as Land Parcel **Uasin Gishu/Kahungura 278** with the suit property. While the 2nd appellant claims that the 1st appellate court violated the parole evidence rule in failing to consider an agreement between him and the respondent which evinced that **Uasin Gishu/Kahungura 278** was to be transferred to him in exchange of the $1\frac{3}{4}$ acres of the suit property and 1 acre of another property, it appears to us that the parties never acted on this agreement, and what was acted upon, is the exchange and transfer of the respondent’s property to the 1st appellant. We therefore find that there is nothing wrong in the manner in which the 1st appellate court considered the evidence before it.

24. The appellant’s final attack on the judgment was that the 1st appellate court fell into error in failing to consider that there was no Land Control Board Consent to transfer the suit property to the respondent. That is in fact, true. However, the lack of consent to transfer does not make the agreement void. This Court in ***Willy Kimutai Kitilit v Michael Kibet [2018] eKLR Civil Appeal 51 of 2015*** held that ***“...the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.”***

25. In the instant appeal, it is apparent that the respondent transferred his property to the 1st appellant in exchange for the suit property from the 2nd appellant. We agree with the 1st appellate court that the agreement between the parties cannot now be rendered void merely because of the lack of consent of the Land Control Board.

26. This leads us to the final submission, which is that the 1st appellate court erred in entering judgment as prayed in the plaint and thus giving an order for specific performance of the agreement between the parties. Was the court wrong in ordering specific performance? In ***Gurdev Singh Birdi & Narinder Singh Ghatora As Trustees Of Ramgharia Institute Of Mombasa V Abubakar Madhbuti***

[1997] eKLR (Civil Appeal No 165 of 1996) Gicheru JA (as he then was) stated that:

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice.”

27. In the circumstances of this appeal, we find that there was evidence of a valid oral agreement between the parties. We find that the lack of consent from the Land Control Board in respect of the suit property could not render the agreement between the 2nd appellant and the

respondent void. In the circumstances, we find that the 1st appellate court properly addressed itself to the issues at hand and reached the correct conclusion in entering judgment in favor of the respondent. We therefore see no reason to disturb that judgment. In the result, this appeal has no merit, and we hereby order it dismissed with costs to the respondent.

Dated and delivered Nairobi this 9th day of July, 2021

M. K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR