IN COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), MAKHANDIA & MUSINGA, JJ.A

CIVIL APPEAL NO. 84 OF 2013

BETWEEN

GITAMAIYU TRADING COMPANY LTD.......................APPELLANT

AND

NYAKINYUA MUGUMO KIAMBAA CO. LTD...1ST RESPONDENT

WARIARA NJENGA...2ND RESPONDENT

MUMBU GICHURU...3RD RESPONDENT

ESTATE OF JAMES NJENGA KARUME..........4TH RESPONDENT

J.R. NJENGA..5TH RESPONDENT

THE COMMISSIONER OF LANDS...................6TH RESPONDENT

THE ATTORNEY GENERAL.............................7TH RESPONDENT

ZEPHANIA MWANGI NYORO ....8TH RESPONDENT

JOHN NJOROGE MUGANA.............................9TH RESPONDENT

PETER KIMANI NJUGUNA...........................10TH RESPONDENT

HAROUN MUCHAI KAMAU.........................11TH RESPONDENT

(An appeal from the judgment of the High Court (A.O. Muchelule, J.) dated 13th February 2012

In

H.C.C.C No.4496 of 1994)

****

JUDGMENT OF THE COURT

Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities. The dispute from which this appeal has arisen demonstrates this conflict. In it, two land-buying companies have disagreed over the ownership of some 16 parcels of land comprised in LR Nos. 89/4-9 and 89/11 -20 (the suit property) measuring approximately 512 acres in Kiambu County. The land was also generally known as Fanros Estate, from the name of the vendor.

Throughout this journey which began in 1977, the appellant has always maintained that on 18th February,1977 it entered into an agreement with Gopal Dass Pall, an agent of Fanros Limited, to buy the suit property at Kshs.4,200,000; that they paid this sum; that its shareholders, who were workers and labourers on the estate went into occupation; that in 1979, the shareholders were forcefully evicted by the local and provincial administration from the suit property in favour of the 1^{st} respondent, (Nyakinyua Mugumo Trading Company Limited) as well as the 2^{nd} to 5^{th} respondents; that the 6^{th} to 7^{th} respondents jointly, fraudulently and illegally caused the suit property to be transferred to the 1^{st} to 5^{th} respondents whilst knowing that the land belonged to the appellant; that was done without the latter presenting proof that they had purchased the suit property and also without proof that they obtained consent in compliance with the Land Control Act.

Consequently, the appellant prayed for: a declaration that it was the legal owner of the suit property either as a purchaser or an adverse possessor; and that the purported sale and transfer of the suit property to the 1^{st} – 5^{th} respondents was null and void on the account of fraud; an injunction to restrain the 1^{st} to 5^{th} respondents from trespassing on the suit property; and general damages for wrongful possession and occupation of the suit property.

The 1^{st} to 5^{th} respondents denied the allegations and insisted that the 1^{st} respondent had been the registered proprietor of the suit property since 1980 and has been in possession and occupation since 1977.

This case was canvassed before Muchelule, J. who in his determination observed that the sale agreement between the appellant and Fanros Ltd did not culminate in a transfer of title; that the suit property was agricultural land whose sale was subject to the consent of the Land Control Board; that no such consent was obtained neither was the appellant exempted; and that in the absence of a consent the agreement was void and unenforceable.

On the complaint that the caveat registered by the appellant against the title was irregularly removed by the 5^{th} respondent, the learned Judge held the view that since the agreement upon which the appellant based its claim was void, it had no right or interest in the suit property capable of being protected by the caveat.

In rejecting the appellant’s claim to the suit property by adverse possession, the learned Judge observed that since the appellant’s members had been in possession for only two years between 1977 and 1979 when they were forcefully removed from the suit property; that, apart from the failure to show they had been on the suit property for a period of 12 years, the appellant did not provide any evidence that it had been in continuous, open and uninterrupted occupation of the suit property; that contrary to the provisions of **section 7** of the Limitation of Actions Act the action by the appellant against the respondents was brought after 15 years.

As expected in such matters, the appellant was aggrieved and lodged this appeal on 13 grounds alleging that the learned Judge: erred in finding that the appellant did not have an enforceable right over the suit property; misdirected himself in failing to appreciate that the sale agreement was executed by the appellant and Fanros Limited and that there was consideration paid; misdirected himself as to the law on fraud by failing to consider the irregular transfer of title; erred in holding that the transaction was null and void for lack of consent despite there being evidence to show that the 4^{th} respondent obstructed the sellers from signing the consent forms; ignored the irregular manner of removal of the caveat; ignored the evidence that the suit property was forcibly taken and the title confiscated from the appellant by the provincial administration; ignored the fact that the 1^{st} respondent did not produce a sale agreement between itself and Fanros Limited; accepted the evidence of DW1 which was at variance with the documentary evidence produced by the respondents; and disregarded the provisions of **section 3(3)** of the Law of Contract Act which was breached in effecting the transfer of the suit property to the 1^{st} respondent. Those were the very grounds that formed the basis of the appellant’s written submissions as briefly highlighted by counsel on behalf of the appellant. He stressed that the appellant tendered evidence demonstrating that the consideration had been paid, hence it became the beneficial owner of the suit property and as a consequence it had enforceable rights over it; that since the purchase price had not been refunded by the vendor, this fact gave the appellant a right over the property; that the learned Judge ignored evidence showing that the indenture dated 7^{th} December 1979 was obtained through fraud by the respondents since they were unable to produce a sale agreement between them and Fanros Limited; that the respondents were not able to prove that they paid for the suit property; and that the indenture was not signed by the directors or any officers of Fanros Limited. According to counsel, **section 3 (3)** of the Law of Contracts Act that requires that any agreement for the disposition of an interest in land be evidenced in writing or in a memorandum in writing was breached; and that both **sections 117** of the Government Lands Act as well as **19 (2)** of the Stamp Duty Act which prohibit presentation of document for registration without payment of stamp duty were not complied with.

Lastly, counsel submitted that although the appellant was evicted in 1979 it continued to pursue the interest of its members in the suit property through Government agencies up to 1982; and that it was in 1982 that they discovered the suit property had fraudulently been transferred to the 1^{st} respondent, hence the period between 1982 to 1994 when the suit was filed the action was brought well within the 12 year statutory period.

For these reasons the appellant insisted that the learned Judge ought to have come to the conclusion that it was the lawful proprietor and that the 1^{st} respondent obtained the suit property by fraudulent means.

In response, the 1^{st}, 3^{rd} and 4^{th} respondents jointly submitted that though an agreement for sale was allegedly entered into between the appellant and Gopal Dass Pall on behalf of the appellant as an agent of Fanros Limited, the latter denied this; that no evidence was presented to show that the appellant paid the purchase price of Kshs. 4.2 million; that the 1st respondent was not required to pay for stamp duty having been expressly exempted; and that **section 3(3)** of the Law of Contract Act did not apply. Accordingly the indenture was registered by the Registrar of Lands because it had complied with the applicable law.

The respondents also argued that Fanros Limited had itself applied for the removal of the caveat placed by the appellant against the suit property and the requisite notice under **section 116(1)** of the Government Land Act had been given to the appellant; and finally that the action brought by the appellant was statute barred as the cause of action arose in 1979 when it was evicted from the suit property and the suit filed on 21^{st} December 1994, being 15 years later.

Based on the foregoing, the respondents prayed that the appeal be dismissed with costs.

According to the 6th and 7th respondents, the appeal raises only three issues; one, whether failure to get consent from the Land Control Board rendered the transaction null and void; two, whether the caveat was removed irregularly; and three, whether the appellant was entitled to the suit property by adverse possession. Citing the provisions of **section 6** of the Land Control Act, counsel for the 6th and 7th respondents submitted that the transaction in question was over agricultural land, which as a matter of law required that the requisite consent of the Land Control Board be obtained, without which the transaction was not only rendered void but, by **section 22** aforesaid also a criminal offence to remain in occupation of land where consent has not been obtained. They cited **Onyango & Another V Luwayi** [1986] KLR 513; and **Munyoro V Murage** [1988] KLR 180 for the proposition.

Regarding the removal of the caveat, counsel submitted that it was done procedurally in accordance with **section 57(6)** of the Registration of Titles Act (repealed) and in terms of the pronouncement in the case of **Peter Waweru Waititu V. Cyrus Karanja,** Civil Appeal No. 257 of 2001; that in any case the caveat was of no legal effect because the alleged agreement between the appellants and Fanros Limited was void; and that the appellant had no legal right or interest in the suit property capable of being protected by the caveat under **section 57** of the Registration of Titles Act.

On adverse possession, it was submitted that, for adverse possession to succeed, first the appellant should have entered the suit property without permission; secondly its occupation should have been uninterrupted, open and quiet for a period of 12 years.

It may be noted at this stage that following the Court's direction for notification of all affected parties, the applicant published notices in the Daily Nation on 18th January 2018 and 1st October 2018. As a result the 8th – 11th respondents filed a notice of appointment of advocates dated 27th August, 2018 and joined in the appeal as interested parties. It was contended for these respondents that they were the true directors of the appellant company and that those who brought this appeal were imposters; that authority to institute and prosecute the appeal ought to have been but was not given by the appellant hence the appeal is not properly before the Court and should be stayed; and that though the proceedings in the High Court were duly commenced with the full authority of the directors, upon delivery of the judgment there was a disagreement between the directors. While some directors were of the opinion that since the suit was dismissed for having been filed out of time, it was prudent to adopt alternative mechanisms to resolve the dispute with finality. As a result this group approached the National Land Commission to determine the legality of the title held by the 1st respondent. The splinter group was dissatisfied with this route taken by the directors and instead, for their part lodged this appeal. In the meantime the National Land Commission declared on 18th April, 2018 that the title held by the 1st respondent was null and void. This decision is however not on record. Due to these differences two suits to determine the directorship of the appellant were filed and are pending before the High Court, being Kiambu HCCC No. 13 of 2018 and Kiambu HCCC No. 16 of 2018. For this reason counsel urged us to consider staying the proceedings pending the determination of that dispute in the two suits.

We reiterate what was stated in the case of **Mwanasokoni V. Kenya Bus** **Services Limited & 3 Others** (1982-88) 1 KAR at page 872 regarding the jurisdiction of this Court on a first appeal, that;

> **" … Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary".**

Although the broad question in this dispute is the ownership of the suit property, in our assessment the determination of whether the respondents did not obtain the requisite consent; whether the action was instituted outside the limitation period; whether the caveat was removed irregularly; and whether the Court ought to stay these proceedings, will provide the ultimate answer to the broad question.

We start with the question whether this appeal ought to be stayed until the determination of the two suits pending in the High Court over the directorship of the appellant. From the case numbering, it is clear that the two actions were filed in 2018, six (6) years after the impugned decision of the High Court. The invitation of the Court through submissions to stay proceedings is not only alien to our rules but also irregular. This Court, by **Rule 42** of its rules is moved this way;

> **"42. (1) Subject to sub-rule (3) and to any other rule allowing informal application, all applications to the Court shall be by motion, which shall state the grounds of the application".**

The application must be supported by an affidavit of the applicant or of some other person or persons having knowledge of the facts. The rules do not make provision for the procedure being invoked here in the submissions. Under **Rule 5(2) (b)** the Court can grant an order of stay of execution or of further proceedings, or where two appeals are consolidated, under **Rule 103** one may be stayed if the Court is of that view. But if a party, as here alleges that no appeal lies or that some essential step in the proceedings has not been taken, he may apply to the Court under **Rule 84** to strike out the appeal. The 8th – 11th respondents missed the point. Their arguments lack substance and are rejected.

Moving to the more substantive issues, we turn to answer the question whether the action was statute-barred. It was the case for the appellant that on 18th February 1977 it entered into an agreement with Fanros Limited to purchase the suit property and thereafter went into occupation. It is common factor that in 1979 its members were forcefully evicted by the local and provincial administration. The suit before the High Court was filed in 1994. The appellant, however insisted that the cause of action arose in 1982, the year it stopped pursuing its interest with the Government. **Section 7** of the Limitation of Actions Act caps the time within which a party can sue to recover land as follows:

> **"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."**

Like the learned Judge, we are persuaded that the date of accrual of the cause of action was 1979 when the appellant's shareholders were evicted. That being the case, the suit was filed 15 years later hence outside the 12 year statutory period. Like Lord Camden LC said many years ago in **Smith V. Clay** [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743:

'A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.' Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: '*Expedit reipublicae ut sit finis litium*', is a maxim that has prevailed in this court at all times, without the help of parliament."

That ground must also fail.

Was the sale of the suit property by Fanros Limited and the registration of the 1st respondent as the owner fraudulent? It was alleged that the respondents colluded and illegally caused the suit property to be transferred to the 1st -4th respondents while they knew that it belonged to the appellant; that there was no sale agreement between Fanros Limited and the 1st respondent; that the indenture dated 7th December 1979 was not executed by Fanros; and that the stamp duty was not paid. For these reasons it was alleged that the transfer of the suit property was fraudulent. From the record, it is not in doubt that on 20th December 1979 the collector of stamp duty marked the indenture as "not chargeable to stamp duty". The exemption to stamp duty by the President was communicated in a Legal Notice No. 96 of 25th May 1979. It was as a consequence of this that, on 9th February 1980 the indenture was registered transferring the suit property to the 1st respondent. The burden was on the appellant to demonstrate, on a preponderance of evidence that as a matter of fact the stamp duty was not paid.

This Court in **Ratilal Gordhanbhai Patel V. Lalji Makanji** [1957] E.A 314, at 317 stressed the importance of proving an allegation of fraud thus;

"There is one preliminary observation which we have to make on learned Judge's treatment of this evidence; he does not anywhere in the judgment expressly direct himself of the burden of proof and or on the standard of proof required. Allegations of fraud must be strictly proved; although standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

Both the appellant and the 1st respondent had expressed interest in the suit property. There is on record an agreement for the sale of the suit property between the appellant and Gopal Dass Pall, described as the duly authorized agent of the former. But there is no documentation on record to prove that Gopal was the duly authorized agent of Fanros Limited. The same agreement also shows the purchase price as Kshs. 4,200,000. However, on record is a duly registered indenture dated 7th February 1979 between Fanros Ltd and the 1st respondent, in addition to the title deeds in proof of the 1st respondent's ownership of the suit property. We may add here that, from the correspondence on record dated 15th August, 1979 addressed to the former President by the late Njenga Karume, the Chairman of the 1st respondent, it is clear that he was engaged in negotiations with the owners of the suit property in a bid to purchasing it. On the other hand in the same correspondence, the appellant admitted that the consideration of purchasing the suit property was Kshs. 1.5 million and that by 24th April, 1973, it had only paid Kshs. 150,000 as deposit being 10% of the purchase price; and that later in 1974 their cheque of the aforesaid deposit was refunded and the purchase price raised to Kshs. 2 million. There is on record a letter dated 16th December 1974 forwarding the deposit of Kshs.150,000; two (2) receipts dated 1976 drawn by the firm of J. K. Winayak & Co. Advocates showing that the appellant paid Kshs. 330,000 and another for Kshs. 670,000 respectively; and a letter dated 21st February, 1977 forwarding a cheques of Kshs. 350,000 being a further deposit. The aggregate of these amounts is Kshs. 1,500,000 which the appellant as noted earlier from the correspondence admitted to have paid to Fanros Limited, which sums were subsequently refunded by Fanros Limited. There is no evidence on record showing that the appellant paid the entire purchase price of Kshs. 4,200,000 in accordance with the terms of the sale agreement.

As we have elsewhere said, there were two competing parties, the appellant and the 1st respondent, over the suit property. The latter reached the finishing line ahead of the former. And that is business. Fanros Limited had the freedom to sell to either party so long as it did so fairly. The respondents cannot be blamed for their persistence and agility in pursuing the sale of the suit property to it or even for being backed by a powerful politician.

For the reason that on 5th April, 1977 Fanros Limited procedurally by lodging an application caused the removal of the caveat, and bearing in mind the fact that the sale agreement with the appellant was not conclusive, of necessity it should follow that, the appellant has failed to prove fraud. This ground must similarly suffer the same fate as the earlier ground.

The following is our determination of the dual issues of removal of the caveat and lack of consent of the Land Control Board. It is not in dispute that the suit property is agricultural land whose sale was subject to the provisions of the Land Control Act. It is equally true and it was conceded that the requisite consent of the relevant Land Control Board was not obtained in the transaction involving the appellant and Fanros Limited. The appellant appears only to have been aggrieved by the failure of the learned Judge to make a determination that the 4th respondent obstructed Fanros Limited from signing the consent forms; and for ignoring the irregular manner of removal of the caveat.

By the provisions of **Section 6(1)** of the Land Control Act, any transaction involving agricultural land;

"....is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

In exercising its discretion whether or not to grant consent, the Board is guided by following factors under **section 9**.

"(a)... the effect which the grant or refusal of consent is likely to have on the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry within the land control area;

(b) act on the principle that consent ought generally to be refused where—

(i) the person to whom the land is to be disposed of—

(a) is unlikely to farm the land well or to develop it adequately; or

(b) is unlikely to be able to use the land profitably for the intended purpose owing to its nature; or

(c) already has sufficient agricultural land; or

(ii) the person to whom the share is to be disposed of—

(a) already has sufficient shares in a private company or cooperative society owning agricultural land; or

(b) would, by acquiring the share, be likely to bring about the transfer of the control of the company or society from one person to another and the transfer would be likely to lower the standards of good husbandry on the land; or

(iii) the terms and conditions of the transaction (including the price to be paid) are markedly unfair or disadvantageous to one of the parties to the transaction; or

(iv) in the case of the division of land into two or more parcels, the division would be likely to reduce the productivity of the land;

(c) refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not—

(i) a citizen of Kenya; or

(ii) a private company or co-operative society all of whose members are citizens of Kenya; or

(iii) group representatives incorporated under the Land (Group Representatives) Act, 1968 (Cap. 287); or

(iv) a state corporation within the meaning of the State Corporation Act, 1986 (Cap. 446).”

Without any specific evidence of how the 4th respondent blocked or frustrated Fanros Limited from obtaining the consent, the reasonable assumption is that the Board exercised its discretion in accordance with the above principles. In any case Fanros Limited has not been a party to the proceedings giving rise to this appeal.

Furthermore, upon its application to the Land Control Board for consent being rejected, the appellant had an appellate recourse to challenge that decision under **sections 10, 11, 12** and **13** by lodging an appeal to the Provincial land Control Appeals Board for the province in which the land in question is situated and if aggrieved, again to appeal to the Central Land Control Appeals Board. Where, in either case no appeal is preferred, the decision of the Land Control Board is final and conclusive and will not be questioned in any court. In such a situation, like what is before us, the agreement is void.

In a long thread of decisions it has been held consistently that failure to obtain Land Control Board consent makes the sale agreement void for all intents and purposes and no principle of equity can soften or change this mandatory statutory provision. See **Hirani Ngaithe Githire V. Wanjiku Munge,** [1979] KLR 50 and **David Sironga Ole Tukai V. Francis Arap Muge & 2 Others** [2014] eKLR.

Turning to whether the Land Control Board’s consent was obtained in respect of the transaction involving the 1st respondent and Fanros Limited, the learned Judge properly, in our considered view, found that on 25th May, 1979 a gazette notice was issued by which the President exempted the sale of the suit property by Fanros Limited to the 1st respondent from the provisions of the Land Control Act. The 1st respondent’s indenture was then registered on 7th February 1980.

Under **section 24**;

“The President may, by notice in the Gazette, exempt—

(a) any land or share, or any class of land or share; or

(b) any controlled transaction, or any class of controlled transaction; or

(c) any person in respect of controlled transactions or some class of controlled transaction, from all or any of the provisions of this Act, or from any prohibition made under section 23 of this Act, on such conditions (if any) as he may think fit to impose”

The transaction involving the 1st respondent and Fanros Limited having been exempted in accordance with the law, this ground too is stillborn.

The appellant lodged a caveat against the title to the suit property in 1977 claiming a purchaser's interest. **Section 57** of the Registration of Titles Act (repealed) states that;

> **"57. (1) Any person claiming the right, whether contractual or otherwise, to obtain some defined interest in any land capable of creation by an instrument registrable under this Act, and any person in whose favour a debenture has been executed by a company within the meaning of the Companies Act or by a company to which Part X of that Act applies creating a floating charge over land (hereinafter called the caveator), may lodge a caveat with the registrar of the registration district within which the land is situated forbidding the registration of any dealing with that land either absolutely or unless the dealing is expressed to be subject to the claim of the caveator as may be required in the caveat, or to any conditions conformable to law expressed therein."**

There is evidence that consequent upon lodgement of the caveat, Fanros Limited applied for its removal on the ground that it had entered into a sale agreement with the appellant. There was therefore a basis for the removal. Apart from that fact, we agree that, since the appellant did not have any enforceable right to the suit property capable of being protected by the caveat it served no purpose, and its removal was proper in law.

On the accusation that there was no evidence that the 1st respondent did not pay for the suit property, again we find on evidence, that on 24th September 1978, the 1st respondent applied and obtained a loan of Kshs. 3 million from Agricultural

Finance Corporation for the purchase of the suit property. The cheque was transmitted to Fanros Limited. In any case Fanros Limited has not complained that no consideration was paid. The appellant ought to have joined it in the suit to clarify whether it received the purchase price of Kshs. 3,300,000 from the 1st respondent.

We do not think there is any merit in the appellant's claim to the suit property by adverse possession. The appellant was evicted from the suit property hardly two years after occupying it. The test in the case of **Wambugu V Njuguna** [1983] KLR 173, was not met. There was no proof that the title holder, Fanros Limited had been dispossessed or continued its possession for the statutory period. The temporary occupation of the suit property by the appellant was with the permission of Fanros Limited.

In conclusion, we find no substance in this appeal. It is accordingly dismissed with costs to the 1st to 7th respondents.

Dated and delivered at Nairobi this 5th day of February, 2019.

W. OUKO, (P)

……………….………..

JUDGE OF APPEAL

ASIKE – MAKHANDIA

…………………………

JUDGE OF APPEAL

D. K. MUSINGA

……………….………….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR