COURT OF APPEAL OF KENYA

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 235 OF 2016

BETWEEN

THE PUBLIC SERVICE CLUB REGISTERED TRUSTEES.....APPELLANT

AND

MARY WANGECI KETHI KARIITHI.....1ST RESPONDENT

MARGARET NJOKI KARANJA.....2ND RESPONDENT

NGARI KARIITHI.....3RD RESPONDENT

KIBUGA KINYUA KARIITHI.....4TH RESPONDENT

(Being an Appeal the Judgment and Decree of the High Court of Kenya at Nairobi (Nyamweya, J.) delivered on 17th June, 2014

in

HCCC NO. 3000 OF 1993)

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JUDGMENT OF THE COURT

1. This suit has been pending before our judicial system for the last twenty six (26) years and counting. It is indeed a sad state of affairs and although as the old adage goes, the wheels of justice turn slowly but grind exceedingly fine, the wheels in this case appear to have ground to a standstill and remained stationary for a long time. Whereas we do not wish to apportion blame for the said delay, our ardent hope is that the wheels will henceforth grind faster and ultimately justice will be done and parties will be relieved of the long wait.

2. The suit which is subject of this appeal was filed by the Trustees of the Public Service Club on 16th June, 1993 through the firm of Musyoka Annan & Co. Advocates claiming several reliefs. At the heart of the suit however is the ownership of land parcel known as L. R 209/1408 situated within Nairobi area (presently referred to as Upper Hill area Nairobi) comprising eighteen decimal nine five (18.95) acres or thereabout (the suit property).

3. The original plaint was amended almost four years after filing of the original plaint apparently to allow the appellants opportunity to particularise the incidences of fraud which they were relying on. A statement of defence was filed by Geoffrey Karekia Kariithi (the defendant)(hereafter the deceased),through the firm of J. M. Njage & Co. Advocates on 5th October, 1993. The same was amended on 20th September, 1994; further amended on 18th July, 1997 and further re-amended on 23rd March, 2013. For reasons that will become apparent shortly, we shall eschew delving into the facts, and the evidence presented before the trial court.

4. The matter was heard and judgment delivered by the Environment and Land Court (ELC), (Nyamweya, J) on 17th June, 2014. In the impugned decision, the learned Judge made the following finding which is principally the subject of this appeal:-

> "It is thus my finding that the plaintiffs are not only deemed to have been aware of the letter dated 12/11/1973, but could also have discovered the excision and allocation of L.R 209/9629, to the defendant had they exercised reasonable care and diligence and maintained interest in the dealings affecting LR 209/1408. These dealings have been shown to have been within the knowledge of the officials of the Public Service Club, who were the plaintiff's agents.

> Arising from the above-stated reasons, it is also my finding that the plaintiff's suit is as a result time-barred and statute-barred pursuant to the provision of the Law of Limitations Act *(sic)* Section 7, for the reason that the suit was filed on 18th June 1993, 18 years after the cause of action arose in March 1975. I will accordingly not proceed with consideration of the outstanding issues, and hereby dismisses the plaintiff's suit. However, as the suit involves land that had initially been allocated to the plaintiff for social and public purposes, each party is hereby ordered to meet their own costs of the suit. (emphasis supplied)

5. From the above excerpt of the judgment, it is clear that the learned Judge did not make any determination on the substantive issues raised in the pleadings and urged before the court. She determined the suit purely on the issue of statutory limitation. According to the learned Judge, the claim was time barred as the suit was filed eighteen (18) years after the cause of action arose. This is the finding that was meant to determine the ownership of the suit property. The appellant being dissatisfied with the said judgment filed this appeal.

6. Although, learned counsel for the appellant, Mr. Machira filed a memorandum of appeal with twenty seven (27) grounds which are in our view prolix and repetitive, the gravamen of the same is whether the learned Judge fell into error when she made the finding that the claim was statutorily time barred without considering the aspects of fraud raised by the appellant and the fiduciary relationship that existed between the appellant and the defendant. We observe from the record that the original defendant passed on in the course of the hearing and was substituted by the four respondents in their capacities as executors of the deceased's Will. We observe further that the first respondent, Mary Wangechi Kethi Kariithi is also said to have passed on on 18th June, 2017 and was not substituted. In view of the fact that there are three other executors who are named as respondents, substitution of the 1st respondent was not necessary pursuant to Section 81 of the Law of Succession Act. The matter therefore proceeded as scheduled on 9th July, 2019 when the appeal came up for plenary hearing. Mr. Machira had earlier on filed lengthy submissions in which he addressed all the substantive issues raised in the plaint which were however not determined by the learned Judge.

7. As stated earlier, we shall keep clear of the issues the learned Judge gave a wide berth. We do so because, though cognizant of the fact that we are a first appellate court, and pursuant to Rule 29 of the Rules of this Court we have the mandate to re-analyse the evidence adduced before the trial court and arrive at our independent decision, determining matters that the trial court has not addressed its mind to, would inevitably rob the parties of a chance to be heard on appeal on the said issues and that might ran afoul the parties right to fair hearing as enshrined in the Constitution. This is the reason why we declined Mr. Machira's invitation to us to delve into the merits of the substantive issues pertaining to ownership of the said property which issues were not addressed by the trial court. We shall refrain from doing so and restrict ourselves to the issue of limitation. If we agree with the learned Judge on the issue of limitation, then the matter ends there. If on the other hand we find otherwise, it behooves us in the interest of justice, to send the matter back for retrial in order to give the High Court an opportunity to consider the substantive issues raised in the pleadings and determine them on merit.

8. That said, we start with the issue of statutory limitation. According to Mr. Machira, both in his written submissions and in his oral highlights, the learned Judge took a very narrow interpretation of the Limitation of Actions Act. He submitted that the learned Judge ought not to have restricted herself to Section 7 of the Act. Citing Section 13 of the Act, he submitted that time cannot start running unless the other party is in possession of the property. He submitted that in this case, the deceased or his estate have never been in possession of the suit property. He submitted further that the appellant's title deed was never cancelled and they are still in possession of the same and are therefore still the owners of the suit property. He cited Section 20 of the Act saying that the deceased had acted fraudulently and the fraud had not been discovered until the officials of the appellant saw strange people trying to carry out a survey of their grounds around the year 1993 and they moved to court immediately.

9. He further posited that the suit concerned a Trust as the deceased was holding the property in trust on behalf of the appellant when he caused part of the suit property to be transferred to himself. Accordingly under Section 20 of the Act, the claim could not have been time barred. He urged us not to consider Section 7 of the Act in isolation and invited us to also consider Sections 9, 13 & 20. On the issue of whether time can start running before a party is in possession, counsel cited this Court's decision in Harrison Ngige Kaara - V – Gichobi Kaara & Shadrack Njanja Kaara (Nairobi Civil Appeal No. 79 of 1996). Where the Court held:-

> "The law on adverse possession is clear. S. 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, provides for a 12 years limitation period for actions to recover land. That period does not start running unless the land is in the possession of some person or persons whose interest in it is hostile to that of the owner thereof. Possession is hostile if it is open, without right, without force or fraud and exclusive. In other words the adverse possessor must be using the land as though it is solely his own before a right of action to recover it can be said to have accrued for the limitation period to start running." (Emphasis supplied)

There was no dispute that the deceased never took possession of the suit property and so according to Mr. Machira, time had not started running for purposes of statutory limitation.

10. Counsel's other facet of argument was that the deceased being one of the Trustees acted in breach of trust when he had the property allocated to himself. He posited that the deceased acted fraudulently and Section 20 of the Limitation of Actions Act applies to this situation. He urged us to allow the appeal.

11. In response, Mr. Mwangi, learned counsel for the respondent opposed the appeal. He submitted that the learned Judge only considered the issue of limitation. He posited that the appellant was aware of the alienation of the land as evidenced by a letter dated 12th November, 1973 from the appellant's Secretary to the Commissioner of Lands, showing revised boundaries of the club area. While conceding that the Commissioner of Lands has no power to alienate land belonging to another person, he contended that in this case, the appellant itself had acceded to the excision of its land. In his view therefore, there was no breach of trust. He maintained that the claim was statutorily time barred and the learned Judge cannot be faulted for so finding.

12. We have considered the entire record of appeal, submissions of both learned counsel and the law. No doubt the learned Judge's determination was solely on the issue of limitation. Our only point for determination is whether indeed the claim was statutorily barred or not. The learned Judge relied on Section 7 of the Limitation of Actions Act whichprovides 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."

13. According to the learned Judge both parties were relying on the letter of allotment to the deceased dated 15th March, 1975 although the Title Deed was issued subsequently on 10th July, 1981. The learned Judge calculated time from 15th March, 1975 to 16th June, 1993 when the first plaint was filed and arrived at 18 years delay. Following this calculation, the appellant's suit could clearly not survive the limitation period.

14. The learned Judge posed the question whether the appellant could have discovered the allocation to the defendant with reasonable diligence. To the learned Judge, the letter dated 12th November, 1973 from the appellant's secretary to the Commissioner of Lands was a clear indicator that the appellant was aware that the land had been demarcated. We cite the said letter verbatim for purposes of clarity.

Public Service Club,

P. O. Box 41185,

NAIROBI.

12/11/1973

Commissioner of Lands,

Department of Lands,

P. O. Box 30089

NAIROBI

Dear Sir,

Nairobi – L.R. No. 209/1408 Hospital Road (formerly Gymkhana Road) Public Service Club

Thank you for your letter reference 16939/89 dated 11th October, 1973.

I enclose two plans showing (boarded in purple) what the revised boundaries of the club area would be having taken out.

a) *The area occupied by the Karen Police Dog Section and*

b) *The land required by the by the Nairobi City Council for the Re-alignment of Hospital Road – both hatched in orange. (This is based on information obtained from the council by our Architects.)*

You will see that the revised boundaries include two very small portions of former Road Reserve which are colored in blue; one adjoining the existing Club House, and the other opposite the tennis courts being a truncation of the former extension of Montgomery Road. In view of the extent of the land being excised, I hope the inclusion of these small areas is acceptable.

The plan has been prepared by superimposing the present survived boundaries as shown on the survey plan obtained from the Director of Surveys onto our Architects block plan and I hope that this is sufficient for your requirements.

Yours faithfully,

HON SECRETARY

C.C. *Peter Shiyukah Bso., Executive Chairman,*

C/o Ministry of Works,

P O Box 30260,

NAIROBI

15. The question we must ask ourselves is whether this letter constituted *prima facie* notice to the appellants that their land had been subdivided and transferred to one of their trustees. In our view it did not. We further note that on 12th September 1974, the Ministry of Lands and Settlement wrote to the Commissioner of Lands in reference to the same subject, the letter which read in part:-

> "… I am directed to convey to you that the Minister has approved the allocation of the areas shown boarded in purple and coloured blue on the enclosed plan to the Trustees of the Public Service Club. The allocation should be based on the usual terms and conditions applicable to grants of this nature as explained in paragraph six (6) of your ref. No. 16939/98 dated 16th May 1974."

16. It would appear from the contents of these letters that the appellant's property was not in danger and if there was any excision, it was not clear from the communication who the new allottees were. In a subsequent letter,(at page 102 of the Record of Appeal) whose date is however not clear, the executive committee of the appellant passed two resolutions. One was to the effect that the land title to the suit property be surrendered to the Government; and another resolution to the effect that

> "*the Commissioner of Lands be formally requested to register the same title deed – ref 209/1408 in the name of the Permanent Secretary, Office of the President and Head of Civil Service.*"

17. Those resolutions do not have the name of the deceased anywhere. We do not wish to say more as we do not want to delve into the substantive merits of the case which were not determined by the trial court. All we want to demonstrate is that even if members of the appellant had exercised due diligence those many years ago, the correspondence available would not have disclosed that the suit property had been transferred to one of their trustees, and subsequent patron.

18. Further, from the record, and as submitted by Mr. Machira, the deceased never took possession of the suit property and only attempted to do so in 1993 and that is when the appellant rushed to court. It may not have been possible for the appellant to discover that its land had been alienated to other parties in absence of physical possession to alert them that something was amiss. On the issue of possession, as stated in the case of Harrison Ngige Kaara - V – Gichobi Kaara & Shadrack Njanja Kaara *(supra)* as read with Section 13(1) of the Act, time would not start running in absence of possession. This brings us to the provisions of Section 20 and 26 of the Act.

19. Without making any findings on whether the transfer of the suit property to the deceased was fraudulent or not, we can safely say that fraud was pleaded and particularised in the amended plaint. Evidence was called in support of the allegations of fraud against the defendant. The High Court does not seem to have considered this evidence. Had it done so, it would have found that the appellant had laid sufficient ground to entitle it to be heard on the issue of fraud. If fraud was established, then the appellant would have been availed refuge under the provisions of Section 20(1) and 26(a) and (b) of the Act. That way, the matter would have been determined on merit.

20. In sum, from the foregoing, we hold the view that given the circumstances surrounding this matter, the appellant's claim was not statutorily time barred and the same was properly before the court. In the circumstances, we allow this appeal and set aside the impugned judgment dated 17th June, 2014. We order that Nairobi ELC Suit No. 3000 of 1993 be remitted back to the Environment and Land Court to be heard and determined on merit. Costs of the appeal are awarded to the appellant.

Dated and delivered at Nairobi this 8th day of November, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

……..…….

JUDGE OF APPEAL

J. MOHAMMED

…….…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR