



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CIVIL APPEAL NO. 20 OF 2014**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)**

**BETWEEN**

GEOFFREY MANGERA OMWOYO ..... APPELLANT

**AND**

YOBENCIA KEMUNTO KEMONI ..... FIRST RESPONDENT

MARGARET NYAITODI GWOMA ..... SECOND RESPONDENT

*(An Appeal from the Judgment of the High Court of Kenya at Kisii (Makhandia, J.) dated 30<sup>th</sup> September, 2010*

**in**

**H.C.C. SUIT NO. 130 OF 2001**

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**JUDGMENT OF THE COURT**

**INTRODUCTION**

1. The respondents' suit in the High Court sought re- survey of a sub-division of a parcel of land that had been sold to the appellant and the remainder thereof so that their measurements could accord with their respective sizes as shown in the mutation and transfer forms executed by the parties in 1980.
2. The trial court found that the parcel of land occupied by the appellant was much bigger than had been sold to him, demonstrating that there had been unlawful extension of the boundaries. The trial court allowed the respondents' prayer. The appellant was aggrieved by that decision and preferred an appeal to this Court.

**THE RESPONDENTS' CLAIM IN THE HIGH COURT**

3. The respondents are wife and daughter respectively, of the late **Kemoni Ngiti Osemo** (“deceased”), and are the registered owners by transmission of land parcel No. **Matutu Settlement Scheme/214** (“Parcel No. 214”) while the appellant is the registered proprietor of land Parcel No. **Matutu Settlement Scheme/215** (“parcel No.215”).

4. The two parcels of land aforesaid were created after subdivision of land parcel No. **Matutu Settlement Scheme/129** which was measuring 19.5 acres, and which was registered in the name of the deceased.

5. In 1980 the deceased subdivided his land into two, Parcel No. 214 measuring 15.5 acres, and Parcel No. 215 measuring 4.0 acres. He then transferred Parcel No. 215 to the appellant at a consideration of Kshs.27,000/=.

6. The respondents contended that by design or fraud, the appellant unlawfully caused his parcel of land to be registered as measuring 5.13 acres instead of 4.0 acres. The fraud was discovered in 1997 when the appellant was extending the physical boundaries of his parcel of land to accommodate the fraudulently enlarged size of the land, which he continued to do, albeit unlawfully, to the extent that as at October, 1999 he was occupying 8.5 acres instead of the 4.0 acres sold and transferred to him by the deceased.

7. In 1999 the respondent filed a suit in the Chief Magistrate’s Court at Kisii, *to wit*, **CMCC No. 648 of 1999**, asserting that his land Parcel No. 215 measures 5.13 acres. The suit was however dismissed with costs.

8. In their suit, the respondents sought re-survey of land Parcels Nos.214 and 215 to accord with the subdivision and transfer mutation forms executed in 1980, damages for loss of user of 4.5 acres illegally retained by the appellant, mesne profits and costs of the suit.

#### **THE APPELLANT’S DEFENCE**

9. The appellant averred that he purchased land Parcel No. 215 in 1978 and its measurements were 5.13 acres and not 4.0 acres as alleged by the respondents. The portion that he purchased was already demarcated. Although the deceased had told him that its size was 4 acres, when the District surveyor went there to measure, he realized it was 5.13 acres.

10. He further contended that it was the respondents’ relative, one **Hellen Kerubo Ndemo**, who had trespassed into his parcel of land, as a result of which he filed CMCC No. 648 of 1999 against her.

11. The appellant stated that upto his death in 1988, the deceased never challenged the size of land Parcel No. 215 and since then the respondents did not raise the issue within the statutory period of 12 years and therefore their suit was time barred.

#### **THE TRIAL COURT’S FINDINGS**

12. The learned trial judge, Makhandia, J. (*as he then was*) considered that all the witnesses who testified as well as all the documents that pre-dated the appellant’s title for land Parcel No. 215, (except for the mutation form that had some alterations) showed that the size of the land that was sold to the appellant measured 4.0 acres. The original mutation form dated 11<sup>th</sup> March, 1983 showed that Parcel No.129 measured 19.5 acres and was subdivided into two portions measuring 15.5 acres and 4.0 acres.

13. Subsequently, on 19<sup>th</sup> March, 1983 another mutation form was prepared, showing that land Parcel No. 214 measured 14.37 acres while parcel No. 215 measured 5.13 acres. No explanation was tendered as to why it was necessary, if at all, to prepare the second mutation form.

14. The learned judge further noted that the transfer in respect of the appellant’s parcel of land was dated 6<sup>th</sup> May, 1988 and was registered on 9<sup>th</sup> May, 1988, whereas the deceased had died on 19<sup>th</sup> April, 1988. The appellant had stated in the transfer form that the consideration for his parcel of land was

KShs.17,000/=, which was not true. The court observed that it was not possible for the deceased to have appeared before the Land Registrar on 6<sup>th</sup> May, 1988 to execute the transfer, since by then he had already died. This was evidence of fraud, the court noted.

### **THE APPEAL**

15. In his memorandum of appeal, the appellant faulted the learned trial judge for failing to hold that the respondents' suit was statute barred, in failing to consider the evidence tendered by the appellant and in accepting the respondent's evidence.

16. In his brief submissions, **Mr. Sagwe**, learned counsel for the appellant, contended that the respondents' suit was time barred, considering that the suit land was sold in 1978 and the suit was filed in 2001, after expiry of 23 years.

17. Counsel further submitted that titles showing the respective measurements of the two parcels of land were issued during the lifetime of the deceased, and the deceased lived peacefully with the appellant until the demise of the former.

18. Mr. Sagwe added that according to the appellant's evidence, the deceased had estimated the size of the portion of the land that he was selling to be 4 acres, and it had already been demarcated, but its actual measurements turned out to be different.

19. Responding to the said submissions, **Mrs. Asati**, learned counsel for the respondents, submitted that the appellant's trespass and/or unlawful extension of his land boundaries to encroach into the respondents' parcel of land was discovered in 1997 and the suit that gave rise to this appeal was filed in 2001. The suit was therefore filed in time.

20. Counsel further submitted that the trial court considered all the evidence that was tendered by all the parties before it and arrived at its well-founded decision.

### **DETERMINATION AND DISPOSITION**

21. We have carefully considered the record of appeal and the submissions by counsel.

Regarding the appellant's contention that the suit was time barred, **section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya** stipulates that an action may not be brought by any person to recover land after the end of twelve (12) 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.

22. The respondents are the administrators of the estate of the deceased. They obtained certificate of grant on 22<sup>nd</sup> March, 1999. The respondents testified that the appellant's trespass into land Parcel No. 214 was discovered in 1997.

23. For purposes of computing time, the cause of action accrued in 1997 and not 1978 when the appellant purchased land Parcel No. 215 from the deceased. That being the case, we do not therefore agree that the respondents' suit in the High Court was statute barred as at 2001 when it was instituted. We dismiss that ground of appeal.

24. As to whether the trial court considered only the evidence adduced by the respondent and disregarded the appellant's evidence, our perusal of the record of appeal does not support that line of submission. The learned judge considered all the evidence adduced by all the parties. He summarized all the evidence and thereafter proceeded to analyse it against the agreed issues for determination.

25. This being the first appellate court, it is required to re-evaluate the evidence adduced before the trial court, assess it and make its own findings and conclusions, which we have done. See **SELLE V ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] E.A. 123**.

26. The respondents testified that the size of land that was sold to the appellant was 4 acres. The District Land Registrar, Nyamira, testified that the application for consent to subdivide land Parcel No.129 into two portions showed one portion was to measure 15.5 acres and the other 4 acres, that the original mutation form showed the same measurements but a subsequent mutation form registered on 22<sup>nd</sup> March, 1983 showed that Parcel No. 214 was 14.37 acres and Parcel No. 215 5.13 acres.

27. When the appellant filed CMCC No. 648 of 1999 alleging that Hellen Ndemo had trespassed onto his parcel of land No.215, the court ordered the District Land Registrar and Surveyor to carry out a survey of the suit land with a view to establishing its acreage. That was done and it was found that parcel No. 215 was measuring 8.5 acres. No wonder the appellant withdrew the suit. Although he was condemned to pay the costs of the suit, he did not do so. The appellant conceded that he was committed to civil jail for one month for failing to pay the costs as ordered.

28. Taking all the above into consideration, we are satisfied that the order sought by the respondents to re-survey the two parcels of land, Nos. 214 and 215 and re-adjust the measurements thereof to be 15.5 and 4.0 acres respectively was well founded and meritoriously granted.

29. We find no merit in this appeal. Consequently, it is dismissed with costs to the respondent.

**DATED and delivered at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**