IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, MWILU & KIAGE, JJA)

CIVIL APPEAL NO.187 OF 2012

JOHN MUNGAI MURANGO ....1ST APPELLANT

SHADRACK NJENGA WARURU ....2ND APPELLANT

AND

JEREMIAH KIARIE MUKOMA ....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Maraga, J.) delivered on 12th day of April, 2011

in

H.C.APPEAL NO.342 OF 2009

****

JUDGMENT OF THE COURT

1. The two appellants, **John Mungai Murango** and **Shadrack Njenga Waruru**, have appealed to this Court against the judgment of the High Court (Maraga J, as he then was) delivered on 12th April 2011 in High Court at Milimani, Nairobi, in Civil Appeal No.342 of 2009 dismissing their first appeal against the judgment of the Resident Magistrate Court at Githunguri in Githunguri CMCC No.74 of 2007.

2. The record shows that the respondent purchased a three acre piece of land from the appellants and paid for the same. The appellants failed to transfer the land to the respondent as a result of which the latter sued the appellants for specific performance in Githunguri Chief Magistrate Court in Civil suit No.74 of 2007 and sought injunction to restrain the appellants from alienating the land parcels Nos. Githunguri/Gathiga/3072 & 3073 which were the subdivisions of land Title No Githunguri/Gathiga/675 from which the three acre parcel was to be exercised.

BACKGROUND

3. The record shows the respondent purchased the three acres at a price of Shs.55,000/= per acre and that he paid the full purchase price. At the time of the sale, the three acres were comprised in land Title No.Githunguri/Gathiga/675 which was then registered in the name of the 1st appellant who held it on his own behalf and on behalf of the 2nd respondent following succession proceedings in the estate of **Murango Ndungu, deceased** and pursuant to a certificate of succession. It was the respondent's

contention that the 2nd appellant was privy to the sale and received his share of the sale proceeds. It was also the respondent's averment that instead of the appellants excising from Title No Githunguri/Gathiga/675 the three acres with a view to transfer the same to the respondent, they embarked on subdivision of the said land between themselves and subdivided it into the two portions as aforesaid to wit, Githunguri/Gathiga/3072 and Githunguri/Gathiga/3073 with the ostensible intention of defrauding the appellant. This is what prompted the respondent to institute the suit (No.74/2007) in the Chief Magistrate's Court at Githunguri.

4. In his judgment delivered on 18th June 2009, the Chief Magistrate at Githunguri found in favour of and entered judgment for the respondent and ordered that the three acres purchased by the respondent be excised from Title Number Githunguri/Gathiga/3073 and be transferred to him (the respondent).

APPEAL

5. The appellants were aggrieved by that decision and consequently filed appeal No.342 of 2009 in the High Court at Nairobi seeking to have it reversed. On 12th April 2011, the High Court (Maraga J, as he then was) delivered judgment in that appeal and dismissed it with costs. It is against that judgment that the appellants have appealed to this Court.

6. In their memorandum of appeal dated 9th August 2012, the appellants proffered seven grounds of appeal in which they contended –

> ***1. That the Learned Judge erred and misdirected himself in finding that the subordinate court had pecuniary jurisdiction to hear and determine the case.***
>
> ***2. That the learned Judge erred and misdirected himself in finding that the appellants defence and counterclaim did not plead the issue of the land board consent.***
>
> ***3. That the learned Judge erred by failing to make a finding on the appellant's counterclaim.***
>
> ***4. That the learned Judge erred and misdirected himself in finding that time stopped running from 2nd July 1987 to 8th May 1998 without legal basis.***
>
> ***5. That the learned Judge erred and misdirected himself in finding that the limitation period was 12 years instead of 6 years provided for by the law.***
>
> ***6. That the learned Judge erred and misdirected himself in finding that the Contract for Sale was entered into by the respondent and the 1st appellant although it was allegedly entered into with the 2nd Appellant and further misdirected himself in finding that the 2nd appellant was an administrator to the Estate of Murango Ndungu (deceased) which he was not.***

7. That the learned Judge erred in failing to make a finding on the issue of res judicata

8. The appeal came up for hearing before us on 25th September 2014 and reserved judgment for delivery on 14th November 2014. Regrettably, there was a mix-up of files in the chambers of the judge presiding in the appeal which precipitated delay in preparation of this judgment. The presiding Judge apologizes for the delay.

9. Mr. M. N. Nyaga the learned counsel for the appellants argued all the grounds of appeal together. His first submission was that the dispute determined in the impugned judgment of the High Court (Maraga J, as he then was) in Civil Appeal No.342 of 2009 was *res judicata* because this Court had in its Judgment dated 7th October 2005 (delivered in Civil Appeal No.129 of 2002 involving the appellants (qua appellants) determined the same issues and consequently the appellants urged us to set aside the impugned on that ground.

10. We have perused that judgment. It was by the same appellants against one Samson Njenga Mungai. The respondent in this appeal was not a party to the appeal. It emerges from the said judgment that –

(1) Land No Githunguri/Gathiga/675 measured approximately 10.5 hectares or 26 acres) and belonged to one Murango Ndungu, the father of the appellants, in whose name it was registered and who also owned a town plot No.Githunguri/Gathiga/T.283.

(2) The appellants' father, Murango Ndungu, died on 6th July 1974.

(3) The appellants were lawfully appointed as the administrators of the estate of their father, Murango Ndungu.

(4) Samson Njenga Mungai stood surety for the appellants during the succession proceedings in which the grant of letters of administration to the appellants was confirmed by the Court following which Samson Njenga Mungai sought to have it revoked on the ground that the deceased (Murango Ndungu) was his step-father and that he had proprietary interest in the two parcels of land as they were ancestral land. The learned trial magistrate who heard the claim by Samson Njenga Mungai dismissed it on the ground that the latter was not an heir to the estate of Murango Ndungu. The two parcels were transferred into the name of the 1st appellant (John Mungai Murango) to hold in trust for the rest of the family of the deceased including the 2nd appellant.

(5) Samson Njenga Mungai filed suit in the High Court against the appellants qua administrators of the estate of Murango Ndungu seeking part of the estate of Murango Ndungu both as an heir and on the basis of trust and at the same time claimed it on the basis of the doctrine of adverse possession. The High Court dismissed the claim.

(6) This Court did not find any merit in the appeal (No.129 of 2002) by the appellants and on 7th October 2005, the appeal was dismissed with costs to the respondent in the appeal, Samson Njenga Mungai.

11. Clearly, the contention by Mr. Nyaga, that this appeal is resjudicata in view of this court's judgment in Civil Appeal No.129 of 2002 is misplaced. Not only were the parties not the same in that the respondent in this appeal was not privy to it, but also the issuescnvassed and determined in that appeal have no bearing on or relationship with the issues in this appeal. It was also contended on behalf of the appellants that the High Court overlooked the issue of consent of the Land Control Board and erred in not holding that, as the consent of the Land Control Board was neither sought nor obtained, the sale to the respondent was null and void. The record shows that the appellants did not raise that issue in the trial court and the learned trial Judge did, in his judgment in the High Court, make a finding that the appellants did not plead want of consent of the Land Control Board. It was his finding that parties were bound by their pleadings and as there was no evidence adduced to show absence of consent of the Land ControlBoard, the appellants' argument was dead in the water.

12. The other submissions raised by Mr. Nyaga related to issues capacity of the 1st appellant to sell the land and the limitation of time in enforcing the sale as well as the jurisdiction of the trial magistrate to hear the claim. It was the appellant's case that the vendor was not the person registered as the proprietor, but rather his co-appellant. This argument lacks weight because the sale was acknowledged by both appellants and both also received the consideration, a fact which the learned Judge considered. He correctly found that the argument could not hold water in the face of the evidence. With regard to the jurisdictionof the trial court, the Court was guided by the pleadings before it which showed that the subject matter of the suit was within the pecuniary jurisdiction of the Court. There was nothing in the pleadings to show that the value of the subject matter was beyond what was pleaded or the court's pecuniary jurisdiction.

13. Mr. Njoroge opposed the appeal. He emphasized, correctly in our view, that the appellant was entitled to raise only issues of law in this second appeal as the High Court had reviewed the decision by the learned trial magistrate and made findings of facts.

14. On the issue of jurisdiction, counsel submitted that it was raised and determined as a preliminary point and no appeal was pursued against the court's decision on the point. In any case, he contended, the question whether the land (the subject matter of the litigation) was overvalued did not arise and the duty of the court was only to interpret the sale agreement. As regards limitation of time, Mr. Njoroge contended that the period set by the Limitation of Actions Act and the Contract Act was 12 years and that it had not elapsed when the suit was instituted.

15. We have perused record and given due consideration to the submissions of both counsel.

16. There are four issues raised in this appeal. These are; (1) whether or not the High Court was correct in law in holding that the trialmagistrate had pecuniary jurisdiction to try the suit; (2) the legal capacity of the 2nd appellant to enter into the sale agreement with the respondent for the sale of the three acres; (3) whether consent of the Land Control Board in relation to the sale was procured in time, (4) whether the suit by the respondent before the magistrate court was res judicata.

17. The issue of jurisdiction of the trial magistrate to hear and adjudicate on the land dispute, between the parties, was raised before the trial magistrate. The appellants as defendants in the suit (No.74 of 2007) before the magistrate contended that the value of the land in question was approximately Shs.500,000/= which was beyond the pecuniary jurisdiction of the magistrate. However, no valuation report was filed by either party. The respondent who was the plaintiff in the suit had pleaded in his plaint that the value of the said land was Shs.55,000/= per acre and he produced as evidence the sale agreement entered into. The appellants did not dispute receipt of the consideration therein stated. Both appellants were co-administrators of the estate of their father whose land they inherited. The respondent produced evidence to show that the 1st appellant had authorized the second appellant in writing to receive the consideration stated in the plaint on his behalf. In these circumstances, the trial court determined the issueof pecuniary jurisdiction on the basis of the pleadings before it. The court correctly found that the pleadings clearly showed that the value of the land which was the subject matter of the suit was within its pecuniary jurisdiction. The High Court upheld that finding. There is no basis for attacking that finding.

18. In our view, parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs.

19. The High Court was alive to the need for the trial magistrate, once the question of jurisdiction was raised, to determine without ado whether or not it had jurisdiction before embarking on hearing the dispute before it. That, the trial magistrate did. As Nyarangi JA so aptly and succinctly put it –

> ***"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

20. The High Court as the first appellate court examined whether or not the trial magistrate had jurisdiction. In doing so, the High Court, looked at the pleadings filed by the parties in the suit in the subordinate court and the evidence and came to the conclusion, rightly in our view, that there was no material before the trial magistrate to show that the value of the suit land was more than that reflected in the pleadings, not least because the appellants did not place any evidence before the trial magistrate to

show that the value of the suit laid was not in tandem with the pleading but went beyond the pecuniary jurisdiction of the court. The trial court could not enter into the realm of speculation in relation to the value of the land any more than the High Court would. As the first appellate Court, the High Court after re-evaluating the evidence, correctly found that there was no material to justify the appellant's contention that the value of the suit land was beyond the pecuniary jurisdiction of the trial magistrate. This Court will not interfere with the concurrent findings of fact by the courts below on the value of the subject matter of the suit. We find no merit on this ground.

21. We have already shown above that the doctrine of *res judicata*could not apply to this case because the issues raised in appeal No.199 of 2002 were not the same because the issues here, and, in any case, the parties were not the same as the respondent in this appeal was not a party to those proceedings.

22. With regard to legal capacity of the appellants to sell, both appellants were the administrators of the estate of their late father who owned the land. The fact that only one of them was registered did not render the agreement bad in law as the co-administrator who was not registered did acknowledge the sale and received his share of the sale price. In the circumstances of this case, the appellants cannot be allowed to walk away from the sale after receipt of the consideration by alleging deficiency on the part of one of them. We find no merit in this ground.

23. On the issue of consent of the Land Control Board, we have expressed our view as above. The appellant's contention was that consent was not obtained within the period of six months stipulated in the Land Control Act at the time. They assumed the burden of proving this allegation but they failed to discharge it. Their grievance in this regard has no basis any more than their claim on limitation which the learned Judge also examined and came to the correct conclusion that it had no merit not least because from the date of breach, the twelve year period had not elapsed when the respondent filed the suit on 3rd October 2007.

24. For these reasons, we find no merit in the appeal which we hereby dismiss with costs to the respondent.

Dated and delivered at Nairobi this *25th day of September 2015*.

G. B. M. KARIUKI SC

..

JUDGE OF APPEAL

P. M. MWILU

...

JUDGE OF APPEAL

P. O. KIAGE

..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR