



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 195 OF 2002

BETWEEN

WALTER JOE MBURU.....APPELLANT

AND

ABDULSHAKOOR SHEIKH1ST RESPONDENT

OPUS INVESTMENT LTD.....2ND RESPONDENT

NATIONAL SOCIAL SECURITY FUND.....3RD RESPONDENT

COMMISSIONER OF LANDS & REGISTRAR OF TITLES.....

.....4TH RESPONDENT

An appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Ransley, Commissioner of Assize dated 16th March, 2012

in

H.C.C.C. NO. 1191 OF 1999

JUDGMENT OF THE COURT

This appeal is from the judgment of the High Court (Ransley, Commissioner of Assize) as he then was dated 14th March, 2015 in Nairobi High Court Civil Case No. 1191 of 1999. The appellant in that case sued **Abdul Shakoor Sheikh** (“the respondent”), **Opus Investment Ltd.** (“the 2nd respondent”) **National Social Security Fund** (“the 3rd respondent”) and the **Commissioner of Lands** together with the **Registrar of Titles**, (“the 4th respondent”) for three reliefs namely, a declaration that the sale and transfer of **LR No. 209/324/3** (hereinafter “the suit property”) by the 1st respondent to the 2nd respondent and subsequently to the 3rd respondent was null and void and the same be nullified; specific performance of the agreement dated 30th August, 1968 between **Abdul Raof Sheikh** and **Mrs. Rosta W. Mburu** and general damages for unlawful eviction.

The 3rd respondent lodged a Chamber Summons dated 11th July, 2001 in which it sought two principal reliefs in the alternative. It sought the striking out of the appellant's claim and in the alternative an order striking out the claim against it. The application was placed before the learned Commissioner of Assize who, on 14th March, 2002, allowed it.

The learned Commissioner of Assize stated:

“Order: It seems to me this suit is time barred as the agreement relied on was dated, the 30th August, 1968 and the suit is filed for a declaration on 15th June, 1999.

In this (sic) result I have no alternative [but]to find the suit time barred in so far [as] the 3rd defendant is concerned

Costs to 3rd Defendant.”

The appellant was aggrieved and lodged the appeal before us citing six (6) grounds but when the appeal was canvassed before us, **Miss Gatherer**, condensed the grounds into one broad ground namely, that the learned

Commissioner of Assize failed to give the appellant a fair hearing, or indeed any hearing before determining that the appellant's suit was time barred.

Learned counsel contended that a right to fair hearing is one of the rights which are not qualified as justice must not only be done, but must also be seen to be done. In her view, the issue of limitation should have been determined in the main hearing.

Mr. Njagi, learned counsel for the 3rd respondent, in opposing the appeal submitted that as the 3rd respondent's Chamber Summons seeking the striking out of the claim as against it invoked the then **Order VI rule 13 (1)(a)** (now **Order 2 rule 15 (1)(d)**) of the **Civil Procedure Rules**, no evidence was admissible and therefore the learned Commissioner of Assize was entitled to deal with the 3rd respondent's application in a summary manner as he did. Learned Counsel further submitted that there is now pending before the High Court a petition over the same property and two courts should not be considering the same issue at the same time.

The record shows that the issue of limitation was raised by the 3rd respondent in its amended defence dated 6th August, 1999. At paragraph 7A, it pleaded”

“7A Without prejudice to the foregoing the third

Defendant avers that the Plaintiff's suit is time barred and the same should be struck out.”

We have perused the record before us and we have been unable to trace any subsequent pleading by the appellant in which a response to paragraph 7A of the 3rd respondent's amended defence was made. The plea of limitation was again made in the 3rd respondent's Chamber Summons which the learned Commissioner of Assize allowed. In response to the same, the appellant contended that his claim was not time barred because he had sought a declaration and that twelve years had not expired for his claim to be caught up by the Limitation of Actions Act.

The learned Commissioner of Assize, from the pleadings, heard the parties' respective positions on the principal issue of limitation before coming to the conclusion that the appellant's claim as against the 3rd respondent was statute barred. Before him was the 3rd respondent's averment in the amended defence and in the chamber summons that the appellant had brought his claim against it twenty (20) years late which

averment the vendor had not rebutted by subsequent pleading. The foundation of the appellant's claim is the agreement of sale dated 30th August, 1968. By the time the suit property was sold to the 2nd respondent and then to the 3rd respondent on 28th

June, 1989 and 3rd July 1989 respectively, a period of over twenty (20) years had lapsed. We are at a loss to appreciate how the fact that the appellant had claimed a declaration would have advanced his case at all.

Section 4 (2) of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides:

"4....."

- 2. An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:"**

And **Section 7** of the same Act provides:

"7 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."

Given the pleadings which were before the learned Commissioner of Assize and the above provisions of the law, it is plain that the appellant's claim was hopelessly out of time. No material was placed before the learned trial Judge to indicate that the parties by their conduct had revived the appellant's claim which had been extinguished long before he lodged his claim before the High Court.

The appellant's difficulties are compounded by the acknowledged fact that the 1st respondent is now deceased and the appeal against him has abated. The appellant pleaded against the 1st respondent as follows in paragraphs 8 and 9

"8. On or about 28th June, 1989 the 1st plaintiff fraudulently sold and transferred the suit premises to the 2nd defendant at a purchase price of Kshs.26,250,000/=

- 9. Five (5) days later on or about 3rd July, 1989, the 2nd defendant fraudulently sold and transferred the suit premises to the 3rd defendant at a consideration of Kshs.63,000,000/=**

PARTICULARS OF 1ST DEFENDANT'S FRAUD

- i. The defendant sold the suit premises in total disregard of the plaintiff's interest as a purchaser of 1.5 acres of the same which information was in 1st defendant's knowledge.**
- ii. The 1st defendant sold the suit premises without a confirmed Grant of Letters of Administration or a valid one.**
- iii. The 1st Defendant colluded with the 4th defendant to remove encumbrances/caveats registered against the suit premises.**
- iv. The 1st defendant transferred the suit premises to the 2nd defendant without a clearance certificate and or a valid clearance certificate**
- v. The 1st defendant colluded with the 4th defendant to remove a notification of charge registered by the Income Tax Department."**

As against the 3rd respondent, the appellant averred :

“PARTICULARS OF THE 3RD DEFENDANT’S

FRAUD

- i. *The 3rd defendant purchased the suit premises with knowledge of the 1st and 2nd defendants illegalities and unlawful transactions.*
- ii. *The 3rd defendant has knowledge of the fact that 5 days before it purchased the property for Kshs.63,000,000/= the 2nd defendant had purchased it for Kshs.26,250,000/=.*
- iii. *The 3rd defendant effected transfer of the premises without a clearance certificate and or a valid clearance certificate.*
- iv. *As a result of the invalidity of the 1st and 2nd defendant’s sale, then the 3rd defendant has no title or valid title.”*

With the appeal against the 1st respondent having abated, it is doubtful, given the above averments against him vis –a – vis those against the 3rd respondent whether the appellant can fix liability on the 3rd respondent. We were also informed from the bar that the suit property has now been sold to the Department of Defence which has not been joined.

For those reasons, we find no merit in this appeal which we order to be accordingly dismissed.

Given the 3rd respondent’s status and the reasons for dismissing the appeal, we order each party to bear their own costs of this appeal and the costs of the High Court.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

