IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, GITHINJI, JJ.A & DEVERELL, AG. J.A)

CIVIL APPEAL NO. 230 OF 2001

BETWEEN

MALAKWEN ARAP MASWAI …… APPELLANT

AND

PAUL KOSGEI ……RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Eldoret (Nambuye, J) dated 6th February, 2001

in

H.C.C. Suit No. 238 of 1977)
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JUDGMENT OF THE COURT:

The origins of the appeal before us is to be found in the plaint dated 12th September, 1977 which was filed in the High Court of Kenya at Eldoret by Malakwen Arap Maswai, now the appellant before us. From the time the suit was filed to the time the appeal came before us for hearing, on 29th September, 2004, is a period of some twenty-seven years. Accordingly, and as is usual in cases concerning land, the litigation has a very respectable history and it is our hope that our decision on the appeal will put a final end to the dispute.

The dispute is about land known as Land Reference No. Nandi/Itigo/260. In 1973, that land was registered in the name of Kiplagat Arap Chepkwony who was the original defendant but who died on 1st October, 1995 and was thereafter substituted by Paul Kosgei, the respondent herein.

The appellant's claim against the late Chepkwony had been that on 18th June, 1973, he had entered into a contract with Chepkwony and that by that contract, he had bought from Chepkwony the land in dispute for the sum of Ksh.21,450/= which he had paid in full. He took possession of the land, fenced it and started to develop it. Chepkwony however, refused to transfer the land to him and in his suit, the appellant had sought specific performance of the contract between them. In his defence, Chepkwony admitted the contract but then went on to plead that no consent of the relevant land control board had been obtained and that being so, the contract between them was void for all purposes by virtue of the provisions of the

Land Control Act, Chapter 302 of the Laws of Kenya. Chepkwony then offered to refund the Ksh.21,450/= paid by the appellant as the purchase price. The appellant was then represented by B.K. Tanui Advocate while Chepkwony was represented by the law firm of Amata & Co. Advocates.

On 31st January, 1979, the matter came before the late Nyarangi, J. when Mr. Tanui appeared for the appellant and Mr. Amata appeared for Chepkwony. Mr. Tanui is recorded as telling Nyarangi, J. that:

> **"There was no consent by the divisional Land Control Board".**

Nyarangi, J. ordered that the matter be mentioned on 28th February, 1979 and on this latter day, a Mr. Mbito appeared on behalf of Mr. Tanui while a Mr. Birech appeared for Chepkwony. This time round, Mr. Birech is recorded as saying that:

> **"K.Shs. 21,450/= had been handed to the advocates for the plaintiff".**

Mr. Mbito, for his part, stated:

> **"I do not doubt Mr. Birech's statement, that the money has been paid. There is the claim of settlement [perhaps "development]".**

The Judge then ordered that the court would hear evidence on development on 3rd October, 1979. Nothing significant happened on this date and it was not until 23rd October, 1979, that Mr. Tanui, for the appellant, is recorded as saying:

> **"No settlement but ask for orders".**

The following order was then made:

> **"ORDER By consent plaintiff to vacate the land Nandi/Itigo/260 by 31/12/79 and to remove cedar plants and barbed wire erected by him. No order as to costs."**

The appellant was obviously not happy with this consent order and by a summons in chambers under Order 44 rule 1 of the Civil Procedure Rules, which was dated 2nd January, 1980, the appellant sought a review of the consent order. That application eventually came for hearing before Mead, J. on 23rd March, 1980. By then, another advocate by the name of Anassi was acting for the appellant. Mead, J. heard the application on various days and by a ruling dated and delivered on 27th June, 1980, he dismissed the application with costs holding that –

> **"….. Mr. Tanui as the plaintiff's advocate at the 23rd October, 1979 had the ostensible authority to announce settlement of the action on the terms recorded by the court in its order of that date. The settlement is binding on the plaintiff."**

There was no appeal from this order with the result that the consent order recorded on 23rd October, 1979 still remains in force undisturbed.

Following the dismissal of his application for review, the appellant appears to have filed Civil Case No. 320 of 1980 in the court of the Resident Magistrate at Eldoret. That case was in turn referred to the District Commissioner for Nandi District who heard it together with some forty-seven elders. They gave their decision dated 14th April, 1981 and awarded the land to the appellant. The land was thereafter registered in the appellant's name and that was the position as at 6th February, 2001, when Nambuye, J. made her decision which is now the subject of the appeal before us.

As we have said, Kiplagat Arap Chepkwony died on 1st October, 1995 and Paul Kosgei, the respondent, was granted letters of administration intestate on 18th October, 1996. On 20th June, 1995 before he died, Chepkwony had filed a notice of motion said to be under Order 50 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, and the substantive order sought in that

motion was that –

> "**(a) An order be made for the eviction of the plaintiff/Respondent from the suit land forthwith."**

The motion was supported by the affidavit of Chepkwony and in the relevant portions of the affidavit, Chepkwony deponed as follows:

> "**3. That the Plaintiff/Respondent unsuccessfully filed the above case against me for the transfer of my land, the subject matter of this case which is NANDI/ITIGO/260.**
>
> **4. That consequently, the Plaintiff/Respondent was ordered to vacate the suit land but has not done so to date.**
>
> **5. That the matter has been referred to the administration for the eviction of the Plaintiff/Respondent in vain (see annexture "KC1").**
>
> **6. That I am a very old and sickly person suffering from Asthma since 1977 and I am constantly on drugs.**
>
> **7. That in the circumstances, I make this affidavit and pray that the Plaintiff/Respondent be evicted from the suit land immediately.**
>
> **8. That this application is brought in good faith and what is stated herein is true to the best of my knowledge, information and belief."**

This is the motion which Nambuye, J. considered in her ruling of 6th February, 2001 and which is now the subject of the appeal before us. Having considered the rival submissions put before her, the learned Judge concluded as follows:-

> "**The net result of this assessment is that the defendant/ applicant is entitled to the orders of eviction he seeks in his application dated 20.6.95. The application is allowed with costs to the defendant/applicant. Eviction process is to be supervised by the area police boss to ensure that the same is done peacefully.**
>
> **The defendant is at liberty to initiate the necessary legal process to have the title reversed and reverted to his name."**

The learned Judge's decision is challenged before us on a total of six grounds and these are that:-

> **"1. The Honourable Judge erred in law and in fact in failing to find that the respondent was barred by the Limitation of Actions Act (Cap 22 Laws of Kenya) from executing a judgment more than twelve years after it was delivered.**
>
> **2. The Honourable Judge erred in law and fact in making orders that the respondent had not prayed for in the application leading to the said ruling.**
>
> **3. The Honourable Judge erred in law and in fact in failing to take cognisance of the replying affidavit grounds of opposition and list of authorities tendered by the appellant before coming to her conclusions.**
>
> **4. The Honourable Judge erred in law and fact in failing to find that after the expiry of twelve years, the cause of action in favour of the respondent had changed and in any event barred by limitations (sic).**
>
> **5. The Honourable Judge erred in law and fact in making the orders she made**

notwithstanding that the appellant is the registered proprietor of the suit land.

6. The Honourable Judge erred in law and fact in failing to consider the merits of the Appellant's application dated 5/10/98 before arriving at her ruling aforesaid."

Mr. Lilan, learned counsel for the appellant, argued grounds 1, 4, and 5 together; he also combined grounds 2 and 3. Ground 6 was abandoned. Grounds 1, 4 and 5 are based on the issue of limitation. Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya, provides as follows:

> **"An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date in which the interest became due".**

Mr. Lilan submitted before us, as he did before Nambuye, J. that the judgment the respondent was seeking to enforce was the consent order made in the case on 23rd October, 1979. The appellant had applied to the High Court to review the consent order but by his ruling made on 27th June, 1980, Mead, J. had refused to review the order and Mr. Lilan contended that time for the respondent to enforce the order for eviction of the appellant from the disputed land started to run for the respondent, at the very latest, from the date when Mead J. refused the application for review. The twelve years provided under Section 4(4) of the Limitation of Actions Act, lapsed on 26th June, 1992 and accordingly, urged Mr. Lilan, the respondent was squarely caught by the provisions of Section 4(4) above. The respondent's notice of motion to enforce the judgment was not brought to court until the 20th June, 1995, nearly four years after the twelve years had lapsed. The learned Judge did not say anything on this issue and she appears to have concentrated on the appellant's efforts to avoid the judgment. We asked Mr. Lilan whether an application to enforce a judgment is itself an "action" and Mr. Lilan said that was so. He first relied on the definition of the term "action" in section 3 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya. There the term "action" is defined as meaning –

> **"…… any civil proceedings in a court and includes any suit as defined in section 2 of the Civil Procedure Act." Section 2 of the Civil Procedure Act defines a suit as meaning – "……all civil proceedings commenced in any manner prescribed."**

So it would appear that the term "action" is wider than the term "suit" since the latter term is included in the term action. Based on the interpretation, the respondent's notice of motion for the eviction of the appellant would qualify as "an action". We would also rely on the authorities cited both before us and before the learned Judge. **Both LAMB & SONS LTD. V. RIDER [1948] 2 ALL E.R. 402 and LOUGHER V. DONOVAN [1948] 2 ALL E.R. 11** dealt with similar provisions under the relevant English statutes. It was held in both cases that an action to enforce a judgment after the twelve year period is statute barred. Locally, the point was conclusively determined in the case of NJUGUNA V. NJAU [1981] KLR 225 where this Court held that "action" in the context of section 4(4) of Cap 22 is not intended to bear a restricted meaning and therefore embraces all kinds of civil proceedings including execution proceedings. We are satisfied Mr. Lilan is right on this point and Mr. A.G.N. Kamau who argued the respondent's appeal before us merely contended that the respondent could not have enforced the judgment earlier because he had been faced with powerful personalities with whom the appellant had aligned himself. It is true the appellant had powerful personalities linedup behind him but that really cannot be a valid answer to an issue of law. Even in 1995 when the respondent filed his notice of motion to enforce the judgment, the powerful personalities behind the appellant had not disappeared from the scene. We think this appeal must succeed on this point.

Grounds 2 and 3 dealt with the issue of the Judge making orders which were not asked for in the respondent's motion and the fact that the learned Judge ordered the eviction of the appellant from the land of which he was the registered owner. There is substance in these complaints but in view of the position

we have taken on the other grounds, we do not feel called upon to go into those matters in great detail. We are satisfied there is merit in this appeal. Accordingly, we allow the appeal, set aside the orders made by the learned Judge and substitute them with an order dismissing the respondent's notice of motion dated 20th June, 1995. On costs, the appellant, though successful, is not entitled to any both here and in the court below. He was perfectly prepared to use and did use the extra-judicial methods to get his way after he had lost in the High Court. Accordingly, our order on costs shall be that each party shall bear its own costs both in the High Court and in this Court. Those shall be our orders.

Dated and delivered at Eldoret this 26th day of November, 2004.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR