IN THE COURT OF APPEAL

AT NAKURU

CORAM: OMOLO, LAKHA & O'KUBASU, JJ.A.

CIVIL APPEAL NO. 65 OF 2002

BETWEEN

SAMUEL GICHINA MUIRURI ..... APPELLANT

AND

EVANSON KIMEMIA ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Nambuye J) dated 27th May, 1994
in
NKR. H.C.C.C. NO. 240 OF 1990)
****

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendant, hereinafter referred to as "**the appellant**" from a judgment of the High Court of Kenya (Nambuye J) at Nakuru in **H.C.C.C NO. 240 OF 1990.**

The respondent (as the plaintiff) filed a suit by way of plaint in the High Court of Kenya at Nakuru seeking judgment against the appellant in the following terms:

> "a)A declaration that the plaintiff is entitled to onehalf share of the 51 acres portion of L.R. No. 422/14 and 10455 situated in Bahati held by the Defendant and that the Defendant is trustee thereof to the Plaintiff.
>
> b)An order that the Defendant do subdivide the said piece of land and transfer to the plaintiff one-half portion thereof.
>
> c)Alternatively, and without prejudice to the foregoing an order that the Defendant do refund to the Plaintiff the sum of Shs.9,750/= aforesaid together with interest thereon at bank rates from 5th August, 1971 to the date of payment.
>
> d)In the event of (c) above, general damages for breach of contract.
>
> e)Costs
>
> f)Such other or further relief as the Court may deem appropriate and just."

The respondent's case in the superior court was that sometime in 1971 he and the appellant entered into an

oral agreement whereby the appellant and the respondent would jointly purchase one share in **Rimuko Farm** which would entitle the two to 51 acres out of a portion of land known as L.R. No. 422/14 and 10455 situated in Bahati. The said share was to be purchased from one Githinji Waweru. It was further agreed in the presence of the said Githinji Waweru that the said share would be purchased in the name of the appellant who would hold one half portion thereof as a trustee for the respondent. Pursuant to the said agreement the respondent paid a sum of Shs.9,750/= to the said Githinji Waweru in the presence of the appellant and advocate Kamere. Pursuant to these arrangements the share was transferred to the appellant. When the respondent approached the appellant to honour the agreement by transferring to the respondent his share, the appellant refused to do so and hence the filing of this suit. In his statement of written defence the appellant denied entering into any agreement with the respondent in respect of the share in Rimuko Farm. He also denied witnessing payment of Shs.9,750/= or any other sum whatsoever. The appellant admitted that he had taken possession of the suit premises but averred that the respondent's claim, if any, was time barred by **Limitation of Actions Act**. Apart from disputing the respondent's claim as based on facts the appellant sought to have the claim dismissed on points of law. In his written defence the appellant averred:

> "8.Without prejudice to the foregoing, the defendant avers that even if there was such an agreement which is denied, the plaintiff's cause of action is time barred by virtue of **Limitation of Actions Act** and the plaintiff will at the hearing of this suit and by way of a preliminary injunction seek to have the same struck out.
>
> 9.Further and without prejudice if the plaintiff's claim is based on trust then the suit is bad in law and the claim must fail and the defendant will seek to have the suit dismissed as being bad in law."

When the hearing of the suit commenced in the High Court the appellant's counsel (Mr Kimatta) raised a preliminary objection based on **Limitation of Actions Act**. This legal point was argued fully before Tanui J who in a reserved ruling delivered on 1st July, 1991, dismissed the objection. After the dismissal of the preliminary objection, the hearing of the suit commenced on 3rd June, 1993, before Nambuye J who finally delivered her judgment on 27th May, 1994, in which she found that on the evidence before her the respondent had proved his case and hence entered judgment in his favour as follows: "In the premises I enter judgment for the plaintiff on the following terms:

> (a)A declaration be and is hereby issued and directed that the plaintiff be entitled to one-half share of the 51 acres portion of L.R. No. 422/14 and 10455 situated in Bahati held by the defendant and that the defendant is trustee thereof of the plaintiff.
>
> (b)That an order be and is hereby issued that the defendant do sub-divide the said piece of land and transfer to the plaintiff one-half portion thereof.
>
> (c)That the defendant be and is hereby directed to execute the necessary transfer forms to effect transfer of the second half share to the plaintiff.
>
> (d)That should the defendant fail to sign the transfer forms Deputy Registrar of this Court be and is hereby authorised and directed to execute the same on his behalf.
>
> (e)There be liberty to apply to (sic) either party.
>
> (f)The plaintiff will have costs of this suit."

As a result of the above the appellant filed this appeal setting out a total of seven grounds of appeal. Mr Kariuki for the appellant dealt with the first two grounds and submitted that the land in dispute was registered under the Registration of Titles Act and yet the learned Judge went out to assume a trust relying on the decision in **LIMULI V MARKO SABAYI [1979] Kenya L.R. 251.**

As regards the third and sixth grounds Mr Kariuki contended that there was no evidence of written agreement and hence the essential ingredients of **section 3 of the Law of Contract Act** were absent.

The fifth ground was closely related to the third and sixth grounds as it related to the issue of limitation. The fourth ground was essentially on the weight of evidence to be believed. It was Mr Kariuki's contention that the learned trial Judge placed too much weight on the oral evidence of Mr Kamere.

In this appeal we are of the view that there were three broad complaints against the judgment of the superior court and these were:

> (i)the learned Judge was in error when she found that there existed a trust.
>
> (ii)the learned trial Judge erred in not finding that the respondent's claim was time barred by operation of law - **Limitation of Actions Act**.
>
> (iii)the learned Judge erred in her evaluation of the evidence.

On the outset we wish to point out that the respondent's claim was based on trust and not on a written agreement. There was indeed no dispute that there was sale of a share of land in Rimuko Farm between one Waweru Githinji and the appellant. The respondent came in as the eleventh person and since the members of Rimuko Company or partners of Waweru Githinji would not accept any more purchasers the appellant bought the share on clear understanding that the respondent had contributed his Shs.9,750/= which entitled him (respondent), to half share. The learned Judge found that this was so in order to circumvent the "rule of ten" in Rimuko Company. In her judgment she said:-

> "The Court is therefore satisfied that the sale agreement exhibit D1 was drafted in the manner and form it was done to go round the rule requiring the number of the members of Rimuko Company not to exceed ten."

On the issue of trust the learned Judge said:- "There is no need for a sale agreement between the defendant and the plaintiff as the relationship alleged and found to exist between them is not one of buyer and seller but that of trustee and beneficiary and there is no provision that the creating of a trust must be in writing. A trust can be implied from the circumstances of the case."

As we have already stated, the respondent's claim was not based on sale agreement but trust. And as this Court held in GICHUKI V GICHUKI [1982] KLR 285 a party relying on the existence of a trust must prove through evidence the existence and creation of such a trust. The learned Judge considered the evidence placed before her and came to the conclusion that the respondent had proved existence of a trust.

In this appeal we are being asked to interfere with the learned Judge's findings of facts. This Court would rarely interfere with findings of fact made by a trial Judge who had the advantage of seeing and hearing the witnesses, unless it is satisfied that there was a misapprehension of the facts on the part of the trial Judge or that he/she overlooked some evidence having a bearing upon the case. It does not appear to us that this is a case in which this Court would be justified in reversing the decision of the trial Judge founded on the Judge's opinion of the credibility of witnesses formed after seeing and hearing their evidence. We agree with what Sir Kenneth O'Connor P. said in **PETERS V. SUNDAY POST [1958] E.A. 424 at p. 429**:-

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of a judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But it is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

We have on our part reviewed and assessed the evidence placed before the trial judge and come to the conclusion that she cannot be faulted in her conclusions. Indeed, we would have come to the same conclusion. These are our views as regards the findings on trust and evaluation of evidence. As regards the law it was contended by Mr Kariuki that the learned trial judge erred in not finding that the

respondent's claim was time barred. On this contention we go back to the proceedings in the superior court. We have already pointed out that there was a preliminary objection raised based on **Limitation of Actions Act**. That legal point was argued fully before Tanui J who then delivered his ruling in which he dismissed the preliminary objection. In dismissing the preliminary objection Tanui J concluded his ruling thus:-

> "I think this preliminary objection cannot be decided without obtaining the necessary evidence relating to taking possession of the said parcel of land and the nature of the dispute between the defendant and one Jacob Mwaura. For these reasons I would reject the preliminary objection at this stage."

That was the determination on that point of law. Since there was no appeal against that determination we are not in a position to entertain it in this appeal. In **MUKISA BISCUIT MANUFACTURING CO LTD V WEST END DISTRIBUTORS LTD [1969] E.A. 696 at p. 701** Sir Charles Newbold P said:-

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In view of the foregoing we see no merit in Mr Kariuki's contention that the learned trial judge erred in failing to find that the respondent's claim was time barred under the **Limitation of Actions Act (Cap 22 Laws of Kenya).**

Lastly, we wish to deal with the decision of Harris J. in GITUCHI FARMERS CO. LTD V GICHAMBA & ANOTHER [1973] E.A. 8, a decision which Mr Kariuki relied on and it should be pointed out that although Mr Kariuki relied on that decision there was an Editorial note to the effect that certain statutory provisions bearing on the issue in that case were not referred to. No wonder Madan J (as he then was) disagreed with Harris J by stating thus in GATIMU KINGURU V MUYA GATHANGI [1976] Kenya L.R. 253 at p 264:-

> "In interpreting a statute, in the absence of an express provision to that effect, it is always wrong for the court to whittle down the rights and privileges of the subject. The court's task is to protect the rights and privileges of the people, not to clip and shear them. I must therefore respectfully disagree with Harris, J. I feel the interpretation which I advocated in Mwangi Mugotho (unreported) is the correct one. And did not Simpson J recognise the existence of a trust in Hosea v. Njiru [1974] E.A. 526?"

For the sake of completeness we observe that in HOSEA V NJIRU AND OTHERS [1974] E.A. Simpson J. (as he then was) held that at the expiry of the prescription period the registered owner holds the land in trust for the person who has prescribed ownership.

We conclude this judgment by stating that the learned trial judge fell into no error in her findings on the issues of fact and law. We have no valid justification in interfering with her findings both on facts and the law. In our view she reached a correct decision.

The upshot of the foregoing is that this appeal must fail and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 8th day of November, 2002.

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR