IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gicheru, Lakha & Owuor JJ A)

CIVIL APPEAL NO 96 OF 1998

WILSON KENYENGA ……...… APPELLANT

VERSUS

JOEL OMBWORI ……..……. RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisii (Mbaluto, J) dated 27th October, 1995 in High Court

Civil Case No 201 of 1986)

JUDGMENT

This appeal concerns a piece of land known as Settlement Scheme/ Ekerubo/92, (the suit land) which is now registered in the name of Joel Ombwori (the plaintiff/respondent) but was at the time when litigation between him and Wilson Kenyenga (the defendant/appellant) commenced in 1986, the property of Ekerubo Farmers Co-operative Society Limited.

The respondent filed a suit by way of plaint in the superior court at Kisii claiming, *inter alia*, the following reliefs;

(a) possession of the said portion of land:

(b) a declaration that the defendant is not entitled to enter or use a portion of the plaintiff's land;

(c) an injunction to restrain the defendant whether by himself or his servants or agents or otherwise howsoever from entering or using the said portion of plot No 92 above.

In a statement of defence filed by the appellant and a counter-claim, he sought orders *inter alia*:

1. Special damages in the sum of 70,000/=.

2. General damages for breach of contract and for breach of trust.

3. A declaration that the defendant is the rightful owner of plot No 14 (now No 92) to the extent of his share therein.

The suit land was part of Ekerubo Ranch formerly owned by Ekerubo Farmers Co-operative Society, consisting of 100 registered owners. All these people apparently came from a place known as Magombo in Nyamira District.

As far back as 1965, these people got together and organized themselves under Ekerubo Co-operative Society Limited for the purpose of acquiring the said ranch comprised of 4871 acres through the Settlment Fund Trustee. The respondent was one of the founder members (No 14) and thereafter was chosen as the first chairman of the Society. After the loans owed to the Settlement Fund Trustee had been paid, the ranch was sub-divided and every member allocated his share. The respondent was allocated the suit land. Before the sub-division, the land was basically used by the Society mainly for ranching purposes, but as more people moved in, each member was initially allocated 10 acres for cultivation of crops. In 1991, when the loan had been paid, and sub-division was complete each member got an additional 36 acres; thereby making a total of 46 acres. The respondent's claim in the plaint was that the appellant was neither a member nor a shareholder of the Ekerubo Farmers Co-operative Society Limited and therefore land could not have been allocated to him. Prior to the sub-division of the ranch, the appellant was a herdsman employed by the Society and upon sub-division his employment was terminated. In this regard, paragraph 9 of the respondent's plaint in the superior court read as follows:

"9. The defendant having had his services so terminated wrongfully and without colour and right entered the said land (plot No 14) and wrongfully took possession of a portion of the said land and has thereby trespassed and is still trespassing thereon."

Consequent thereto, the appellant deprived the respondent the use and enjoyment of his land and occasioned him loss and damage. This was the basis upon which he prayed for possession of the portion of land that the appellant occupied plus damages or mesne profits.

The appellant denied that he was ever in the employment of the Ekerubo Farmers Co-operative Society Limited. His story was that he was a coowner with the respondent of Plot No 14 (now plot No 92) having contributed to the purchase of the same. Therefore, he was in law and equity entitled to half-share in the suit land. In the alternative he claimed that he had acquired an interest in the land by reason of having lived on the suit land for period of over twelve years pursuant to the Limitation of Actions Act.

He left his home and went to Ekerubo Ranch in 1968 at the invitation of the respondent as a partner and a relative. Soon after that he began putting up a house and cultivating the initial 10 acres of land given to them. Although he was not a registered member of the Society, he was a shadowmember to the respondent's membership, hence his having to deliver all his produce mainly pyrethrum under the respondent's name. He produced 54 receipts as exhibits and claimed that they were given to him by the Society from the proceeds delivered by him, which monies he contributed for the purchase of the land. In addition he made other financial contributions from the sale of animals, and all these monies were put on the respondent's account.

The respondent did not take kindly to this. He asserted that he was a senior veterinary officer employed by the Kenya Government and could not have sought out the appellant, a young unemployed and sickly boy, to be his partner. As far as the respondent was concerned, the appellant moved on to his land when he no longer was employed by the Society as the master roll of the Society produced in evidence clearly indicated.

The learned judge of the superior court, Mbaluto, J heard the evidence of both sides consisting of the parties themselves and not less than four witnesses from either side. He believed in part the evidence of the plaintiff in that the appellant did not come onto the suit land as a co-owner. Further, there was no agreement between the two as to the co-ownership of the suit land nor was there sufficient evidence to establish the claim that the appellant had made any capital investment in the purchase of the suit land. As for the claim based on adverse possession, the judge found that the same had not been established for the reason that the appellant had failed to prove that he had occupied any specific area of the suit land; nor was there sufficient evidence of the length of the time he had occupied the land.

Counsel for the appellant has argued as one of his main grounds the issue of the learned judge not addressing his mind to the evidence adduced and reaching a finding that indeed and in fact the appellant had made out a case that warranted trust being construed or implied in his favour. We do agree with Mr Bw'omote, counsel for the appellant, that entirely lacking in the judgment of the superior court is a finding on the issue of trust. We will revert to this issue later.

Our understanding of the matter, therefore, is that the learned trial judge in coming to the conclusion that he arrived at, he relied substantially on his finding that the appellant had not established his claim that he had acquired a right in the suit land by way of adverse possession. Therefore, he was a mere trespasser. Our concern now is the manner or form adopted by the appellant in his endeavour to obtain the relief he sought in Court. This issue was not pleaded nor was it raised by way of submissions in the superior court. Notwithstanding the fact that Mr Sichangi did not properly place the issue before this Court in terms of rule 91 of the Rules of this Court, both counsel did canvass the issue before us. It goes to the jurisdiction of the Court. See *Wanjiku Muhia vs Ng'ang'a Mutura* CA No 142 of 2000 (unreported) where this Court quoted with approval Sir Charles Newbold, P in the case of *Domodar Jinabhai Co Ltd & Another vs Eustace Sisal Estate Ltd* CA No 51 of 1965 [1967] EA at page 158:

"A question of jurisdiction is, however a matter of which the Court can and should take cognizance whether or not the matter is raised in argument and as the matter is quite clear we have thought it unnecessary to invite submission from counsel on the point."

This Court was satisfied as we are now that it had the jurisdiction to deal with the point of law raised in the appeal notwithstanding the fact that the same had not been raised or decided upon by the lower court. The respondent commenced this action by way of plaint. The appellant's claim by way of counter-claim was that he had acquired a right over a portion of the suit land by way of adverse possession. Paragraph 4 of his defence stated as follows:

"4. Without prejudice, to the foregoing and in the alternative, the defendant says that by reason of his occupation of the said plot for a period exceeding twelve (12) years he has acquired an interest in the said plot by reason of the provisions of Limitation of Actions Act."

Order 36 rule 3D of the Civil Procedure Rules specifically stipulates as to the manner such claims are brought to Court. Such claims for adverse possession are brought by way of originating summons. This is a mandatory provision and it has been repeatedly held by this Court that failure to comply with this mandatory provision makes a suit incontestably bad in law. See *Bwana vs Said* [1991] 2 KAR 262 and *Lali Swaleh Lali & Others vs Stephen Mathenge & Others;* CA No 132 of 1993.

Consequently, an order for adverse possession could only have been made in favour of the appellant if he had complied with order 36, rule 3D. On this ground alone it would be in order for us to disallow this appeal. However, we will briefly deal with those grounds of appeal that attacked the failure of the learned judge to find that there was sufficient evidence upon which to imply a trust in favour of the appellant.

The second ground upon which the appellant based his claim was a trust. We have carefully considered the pleadings. We are satisfied that trust was not pleaded. No particulars of the trust were pleaded and none was relied upon in compliance with order 6 rule (8) of the Civil Procedure Rules. In any event, as pointed out earlier in this judgment, the plaintiff in his own pleadings and evidence clearly claimed that he was a co-owner of the suit property. It is our view that such a claim is inconsistent with a claim under a trust. In the absence of a pleading of trust, this claim cannot be permitted to be raised or decreed. As a rule, relief not founded on pleadings will to be given and cases must be decided on the issues on record see *Captain Harey Gandy vs Casper Air Charters Ltd* (EACA) 1956 Vol 23. The learned judge cannot be faulted for not having found that indeed the respondent held the suit land in trust for the appellant. This becomes even more necessary when the statute provides categorically as is the case with order 6 rule (8) that the particulars of trust must be pleaded. We are, therefore, entitled to also reject this limb of the appellant's case.

For the above reasons, we find no merit in the appeal and dismiss the same with costs to the respondent.

Dated and Delivered at Kisumu this 18th day of May, 2001

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL