REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

***(Coram:nyarangi, Gachuhi JJA & Kwach Ag JA**)

CIVIL APPEAL NO 147 OF 1988

MUSA SIMANI.....**APPELLANT**

VERSUS

SHADRACK MAGOTSWE.....RESPONDENT

(Appeal from the decision and order of the High Court at Nairobi,Gicheru J dated 30th April 1987

in

Civil Appeal No 177 of 1984)

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JUDGMENT

July 14, 1989, the following Judgment of the Court was delivered.

The subject matter of this appeal is a piece of land measuring some 76 x 76 paces in Koibarak sub-location in Nandi District. According to Mr Musa Simani (the appellant) he had bought the suit land from Shadrack Magotswe (the respondent) through the agency of his late father, Elisha Shiverenge, way back in 1967 at a consideration of Shs 6,500. It is common ground that the suit land was at all material times held under customary tenure. Elisha Shiverenge did not take possession of the piece agreed to be sold to him but following his death in 1969 the appellant without the consent of the respondent and without consulting him at all began to assert rights of ownership over the suit land first by erecting semi-permanent building on it in 1974 and then fencing it off with barbed wire. The appellant apparently claimed a larger piece than the respondent had originally agreed to sell to Elisha Shiverenge, the appellant's father.

On 30th March, 1977 the respondent filed a suit against the appellant and a second defendant named John Ikobwa in the District Magistrate's Court at Kapsabet alleging trespass and seeking among other reliefs the eviction of the defendants from the suit land and a permanent injuction against both of them Ikobwa died before the trial and proceedings against him were discontinued leaving the appellant as the only defendant in the action.

A defence was filed on behalf of the defendants denying the respondent's claim which defence was subsequently amended following the filing of an amended plaint by the respondent. Paragraphs 3 and 8 of the amended defence contained the following averments:

"(3) By agreement dated 13th day of February, 1967, the plaintiff sold a piece of land to the first defendant for Shs 6,500 and the boundaries were demarcated and marked by the plaintiff defendants and witnesses.
(8) From the time of completion of purchase the first defendant became and is the owner and occupier of the same land in Koibarak sub-location, Nandi District."

Notwithstanding these averments there was no counterclaim for a declaration that the appellant was the legal owner of the suit land and the amended defence ended with a simple prayer for the dismissal of the respondent's claim against the defendant's with costs.

It is important to note that at all stages through which this long drawn battle was passed both parties were represented by Advocates of very wide experience. The suit finally came up for hearing before the third class District Magistrate who heard evidence from both parties and their witnesses and gave judgment for the respondent. Although the appellant and some of his witness alluded to the agreement for sale dated 13th February, 1967 it was never produced and so it never became part of the record in the proceedings before the trial Magistrate. The District Magistrate came to the conclusion that no valid contract for sale had been shown to exist between the respondent and Elisha Shiverenge and that even if one had been found to exist it could not be enforced by the appellant as the appellant was not privy to it. An order was made declaring the respondent as the legal owner of the suit land.

Aggrieved by the decision of the District Magistrate at Kapsabet the appellant appealed to the Resident Magistrate's court at Eldoret (Civil Appeal No. 1 of 1983). The Resident Magistrate, Eldoret, heard submissions from the Advocates of both parties and dismissed the appellant's appeal. He made concurrent findings as the District Magistrate that the appellant was a stranger to the agreement for sale, that there was no enforceable contract of sale as Elisha Shiverenge never took possession of the suit land and that the appellant was indeed a trespasser upon the respondent's land.

Neither before the District Magistrate at Kapsabet nor before the Resident Magistrate at Eldoret did the appellant or his Advocate complain that the record of proceedings was in any way incomplete or that it did not contain or left out a vital document which had previously been admitted in evidence before the District Magistrate namely the agreement for sale dated 13th February, 1967. Nor was any application made to the Resident Magistrate on behalf of the appellant for leave to adduce additional evidence.

The appellant then filed a second appeal to the High Court in Nairobi to contest the decisions of the District Magistrate and the Resident Magistrate. In a careful judgment, Gicheru J (as he then was), held that the appellant had been sued in his personal capacity as a trespasser on the respondent's land and that the contract of sale of the suit land at a consideration of Shs 6,500, between the appellant's father and the respondent was unenforceable for uncertainty of the subject matter and for incompleteness of the contract by which, the learned Judge no doubt meant that Elisha Shiverenge did not complete the transaction by moving into immediate possession. He dismissed the appellant's appeal with costs.

The decision of Gicheru J (as he then was), would have marked the end of the road for the appellant in normal circumstances and brought this saga to an end. The appellant had no further right of appeal to this court. This is clear from the provisions of section 71A of the Civil Procedure Act (Cap 21) which states:

“71A (1) Except where otherwise expressly provided by this Act ... an appeal shall lie to the High Court from a decree passed by a subordinate Court of the first class on appeal from a subordinate Court of the third class, on a question of law only.
(2) An appeal under this section shall be final.”

Not being content with the unanimous verdicts of the District Magistrate’s Court the Resident Magistrate’s Court and the High Court all of which were in favour of the respondent the appellant engaged a new Advocate who then decided to make an application for the review of the judgment of the High Court under Order 44 rule 1 of the Civil Procedure Rules from which an appeal lies as of right to this court by virtue of the provisions of Order 42 rules 1 (1) (aa) of the Civil Procedure Rules.

So, on 5th April, 1986, the appellant’s new Advocate took out a Notice of Motion under Order 44 rule 1 of the Civil Procedure Rules seeking a review of the judgment of Gicheru J (as he then was) given on 3rd March 1986. The application was supported by the affidavit of Musa Simani, the appellant, setting out in great detail the grounds upon which he thought he was entitled to a review of the judgment. The bottom line of the appellant’s contention was that the failure of the High Court to take into account the sale agreement dated 13th February, 1967 between the respondent and the appellant’s father constituted an error on the face of the record. He also contended that the proceedings before the District Magistrate and the Resident Magistrate were entertained without jurisdiction and were a nullity for lack of consent by the Land Adjudication Officer for the area within which the suit land was situated under Section 30 (1) and (2) of the Land Adjudication Act (Cap 284). The appellant also felt he should be allowed to put in additional evidence contained in two affidavits sworn by Mr Okhoya Ainea Wafula and Mr Benjamin Osundwa, both of whom claimed that they dealt with a boundary dispute between the appellant and the respondent over the suit land in 1975 and 1976, when Mr Wafula was a District Officer, Northern Division, Nandi District, and Mr Benjamin Osundwa was the District Commissioner, Nandi District.

The learned Judge made short shrift of these contentions. In relation to the sale agreement, he held that it was never tendered in evidence at the trial and consequently never formed part of the record of proceedings in the trial.

As regards the consent under section 30 of the Land Adjudication Act (Cap 284), the learned Judge held that having obtained a consent to continue the proceedings following the declaration of Koibarak area as an adjudication section, that consent was sufficient and there was no legal requirement to seek a further consent when the appellant subsequently amended his plaint to introduce a new cause of action.

With regard to the affidavits, the learned Judge held that the appellant was seeking to introduce new evidence which in any case was within his knowledge and could have been produced by him at the original trial before the District Magistrate at Kapsabet. The learned Judge came to the conclusion that the application did not fall within any of the requirements of Order 44 rule 1 of the Civil Procedure Rules and dismissed the application giving rise to the present appeal.

The memorandum of appeal contains 7 grounds of appeal. At the commencement of the hearing of this appeal, Mr Khaminwa, for the appellant sought leave to urge a further ground namely:

“That the learned Judge erred in failing to appreciate that the subject matter of the proceedings before him i.e. the suit land had been caught by the Magistrates’ Jurisdiction (Amendment) Act (Act No. 14 of 1981) and consequently the learned Judge should have made an order remitting the case to a panel of elders for determination.”

This new ground was not taken before the learned Judge either on appeal or at the hearing of the application for review but since it raised a point going to the jurisdiction of the Court we gave leave to Mr Khaminwa to argue it although he had not given advance notice of his intentions either to the Court or to Mr Miruka Owuor, learned Counsel for the respondent. Mr Miruka Owuor, quite rightly, protested that he was being taken by surprise but in order to avoid further delay in disposing of the appeal, he consented to the addition of this new ground on condition that if he felt he needed an adjournment to prepare his reply to the submissions of Mr Khaminwa on this point, his request would be favourably considered. In the event, this did not become necessary as Mr Miruka Owuor made his reply without the necessity of an adjournment.

Mr Khaminwa condensed grounds 1,2,3,4, and 5 into a single ground challenging the decision of the Judge on the ground of an error of law on the face of the record. Mr Khaminwa then dealt with ground 6 of appeal relating to fresh evidence followed by a new ground 7 raising the jurisdiction point under the Magistrate's Jurisdiction (Amendment) Act (Act No 14 of 1981), which limits the jurisdiction of magistrates' courts in certain cases relating to land. Mr Khaminwa then finally dealt with the last ground relating to the issue of consent under section 30 of the Land Adjudication Act (cap 184).

We now deal with these grounds in the order in which they were presented. Grounds 1 to 5 relate to the application of the provisions of Order 44 rule 1 (1) which is in the following terms:

"0.44 r 1 (1) Any person considering himself aggrieved– (b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order."

Mr Khaminwa drew our attention to numerous references in the record relating to the sale agreement dated 13th February, 1967, between the respondent and the appellant's father and submitted first, that these references indicated that a copy of the agreement had been admitted in evidence at the trial and became part of the record and secondly, that these references showed that the agreement having been admitted, was subsequently mislaid by the court. For that reason, he continued, both the District and Resident Magistrates and the learned Judge on second appeal, fell into error when they failed to take into account the said agreement. This failure, so Mr Khaminwa submitted, constituted an error on the face of the record and for that reason the appellant's application for review should have been granted.

After full consideration and a careful perusal of the record in all the three courts we have come to the conclusion that the finding by the Resident Magistrate and the Judge that the agreement in question was never tendered in evidence and so did not form part of the record in the proceedings, is well founded. Order 13 rule 3(1) provides that every document which has been admitted in evidence shall form part of the record of the suit. It goes on to state in sub-rule (2) of rule 3, that documents not admitted in evidence shall not form part of the record. There is no evidence on the record to support Mr Khaminwa's contention that the original agreement or a copy thereof was ever admitted as part of the record of the suit within the meaning of Order 13 rule 3 (1) and (2) of the Civil Procedure Rules. The decision of the Courts to disregard the agreement notwithstanding the references does not, in our view, constitute a mistake or error apparent on the face of the record. This ground accordingly fails.

On ground 6 which relates to the affidavit evidence of Mr Osundwa and Mr Wafula, Mr Khaminwa submitted that it constituted the discovery of new and important matter or evidence but on the appellant's own showing these two gentlemen dealt with the boundary dispute between him and the

respondent in the years 1975 and 1976, well before the respondent instituted proceedings against him in the District Court at Kapsabet on 30th March, 1977. We do not therefore see how their evidence can be said not to have been within the knowledge of the appellant or why it could not be produced by him at the trial before the District Magistrate in August, 1980. There is clearly no substance in this ground of appeal and it also fails.

As for any other sufficient reason, Mr Khaminwa takes the point that the respondent did not obtain the necessary consent from the Land Adjudication Officer to institute the suit against the appellant as required by Section 30 of the Land Adjudication Act (Cap 284) which provides as follows:

"30 (1) Except with the consent in writing of the adjudication officer no person shall institute, and no Court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act they shall be discontinued unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs."

Mr Khaminwa's submission on this point was that the consent given by the Nandi District Adjudication Officer was good only in relation to the original claim as set out in the plaint filed on the 30th March, 1977, and that when he subsequently filed his amended plaint on the 16th June, 1980, thereby introducing a new cause of action, the respondent should have obtained a fresh consent from the Land Adjudication Officer. This submission cannot be correct, first, because that is not what the section says and secondly, because mere amendment of a plaint to introduce a new cause of action cannot amount to institution of a new suit. We are therefore in complete agreement with the learned Judge that whether or not a new cause of action was introduced by the amendment, no fresh consent from the Land Adjudication Officer was by law required. This ground of appeal therefore also fails and consequently it does not become necessary for us to express any view on the question whether it fell within the definition of "any other sufficient reason" under Order 44 rule 1(1) of the Civil Procedure Rules.

We now turn on the last ground of appeal which Mr Khaminwa thought was his trump card. The Magistrates' Jurisdiction (Amendment) Act came into force on the 31st December, 1981. By Section 9A of the Act, land cases involving beneficial ownership of land, division or determination of boundaries, a claim to occupy or work land and trespass to land were taken out of the hands of the Magistrates' Courts and referred to a panel of elders for resolution subject to the traditional provisions in section 4 of the Act by which it is provided that:

"4) Where any case to which part IIIA of the Magistrates' Courts Act applies has, at the commencement of this Act, been filed in a surbordinate Court, then, unless the court has at that time heard the case pronounced it shall forthwith make an order referring the case to a panel of elders and the case shall then proceed under this part." (The underlining is ours).

The District Magistrate, Kapsabet, heard the case and delivered his judgment on the 15th August, 1980, well before the Act came into force. It was Mr Khaminwa's submission before us that when the appellant filed his appeal (Civil Appeal No 1 of 1984), in the Resident Magistrate's Court, Eldoret, it fell within the prohibition under section 9A of the Act with the result that the Resident Magistrate had no jurisdiction to hear the appeal and should have referred the matter to a panel of elders to deal with. This submission, novel as it appears, cannot be correct unless it was the intention of the legislature to remove the appellate jurisdiction of the Subordinate Courts over these matters. If that was the intention, nothing

could have been simpler than for the legislature to say so. Reading the Act as a whole, we would require very clear language before we can be persuaded that the amendment also affected the appellate jurisdiction of the Subordinate Courts. The Act refers to cases and the word “appeals” is not used anywhere. In any event, it is difficult to envisage how a Court in the exercise of its appellate jurisdiction can be required to make an order referring such a matter to a panel of elders. We respectfully think that the trial court which heard the case and pronounced judgment would be in breach of the transitional provision were that Court to make a reference to a panel of elders. Clearly, therefore, the appellate Court would not lawfully refer issues in the appeal before it to a panel of elders. It must follow that this ground of appeal also fails.

Out of deference to Counsel, we would point out that Mr Khaminwa referred us to a number of authorities all of which we have carefully read, but we did not find one that was relevant to the issues in this appeal.

For the reasons we have given, this appeal fails and it is ordered to be dismissed with costs.

Order accordingly.

Dated and delivered at Nairobi this 14th day of July , 1989

J.O. NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

R.O. KWACH

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR