



Case Number:	Civil Suit 43 of 2001
Date Delivered:	22 Feb 2018
Case Class:	Civil
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	Samwel Ndungu Mukunya
Citation:	Zakayo Waswa v Mellitus Charles Nyongesa [2018] eKLR
Advocates:	Mr. Kituyi for the defendant, Mr. Murunga h/b firm of Nalienya Muruka & Co. for the Plaintiff
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Bungoma
Docket Number:	-
History Docket Number:	-
Case Outcome:	Suit struck out
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL SUIT NO. 43 OF 2001.

ZAKAYO WASWA.....PLAINTIFF

VERSUS.

MELLITUS CHARLES NYONGESA.....DEFENDANT

JUDGMENT.

[1]. Zakayo Waswa, the plaintiff herein filed a plaint amended twice and states that he was the registered owner of West Bukusu/North Mateka/77 and West Bukusu/North Mateka/85 measuring 2.8 hectares and 0.6 hectares and that he occupied the said lands with his family. He avers that in 1972 he agreed to sell to the defendant parcel 85 although the Land Control Boards consent was not obtained. That in 1973 he orally agreed to exchange his land parcel West Bukusu/N. Mateka/77 which was approximately 8 acres with another price of similar size which land was to be identified and that the defendant was to pay for the same and that therefore pursuant to that agreement he moved and vacated his land, granted the defendant possession of the same, W. Bukusu/N. Mateka/77. He states, that he initially identified a land of four acres, asked the defendant to pay for and the defendant failed to do so. The plaintiff who had taken possession was eventually evicted from that land of four acres. That he later identified yet another land owned by one Bonny Mukisu and the sale also failed to materialize whereupon in 1975 the plaintiff found one acre with the help of his father In-law and that is where he settled. He avers that this is inspite of his demands that the defendant fulfills his promises.

[2]. The plaintiff claims that in 1978 he returned to his original lands and demanded that the defendant moves and vacates out of the suit lands whereupon the defendant reneged on the agreement and maintained that he had already paid the purchase price for W. Bukusu/N. Mateka/77. The plaintiff alleged that in 1978 he was rudely arrested and handcuffed by Administration Police frog matched to Kavujai Kanduyi Land Control Board where he was intimidated and forced to sign documents he did not understand despite his protestations. He alleged that he later learnt that the defendant had fraudulently and illegally procured registration in his own names without the plaintiff's consent. The plaintiff avers that he discovered the defendants fraudulent Acts in 1994.

He prays for a declaration that the defendants registration as owner of the said lands was fraudulent and unlawful and for an order that the plaintiff is the lawful owner of the same and that the defendant should transfer the suit land, W. Bukusu/N. Mateka/85 to the plaintiff and that he holds the same in trust for his family.

[3]. The defendant filed his defence and stated that the amended defence is bad in law and that the same should be struck out. It was also argued that the suit is barred by the statute of limitations and that it mischievously seeks to hide the necessary particulars as to the cause of actions. The plaintiffs denies all the contents of Paragraph 4, 4a (b) (c) and states that they are dishonest and that the plaintiff has himself acknowledged selling the lands and he cannot now after 40 years later feign ignorance and that the particulars of fraud herein are false. The defendant takes issue with the plaintiffs allegations that he discovered the fraud in 1994. He avers that the plaintiff sold the land in 1972 and vacated it. He states that the plaintiff himself was sued vide Bungoma Civil Suit No. 192 of 1987 together with the defendant

by his own children that he and the new registered owner (defendant herein) held the land in trust for those children. That therefore the plaintiff must have known the status of the titles in 1987. It was argued by the defendant that no trust could arise since the land was sold in 1972 and the plaintiff voluntarily vacated the land.

[4]. The issue determination is whether;

(a) *This suit is time barred*

(b) *whether the suit lands were transferred fraudulently*

(c) *whether the plaintiff is entitled to the order sought.*

[5]. Land parcel W. Bukusu/N. Mateka/85 was transferred to the defendant Melitus Charles Nyongesa on 4th August, 1987 and a title deed issued on the same day. The consideration was Kshs.2,000/=. This was pursuant to an application to Kavujai Division Land Control Board dated 5/6/1972 and signed by the seller and purchaser. A consent was granted by the board on 10th June, 1978. All the relevant documents were produced in court by the defendant.

A certified copy of the green card of E. Bukusu/N. Mateka/77 produced in Court shows that this land was registered on 1/10/70. On 6/12/74 a caution was registered in favour of the defendant claiming purchasers interest and on 27/7/87 the defendant was registered as the owner having purchased the same for Kshs.3,000/=. This land was registered pursuant to an application to the Kavujai Division Land Control Boards application for consent dated 5/6/1978 and a consent of the said Board dated 10th June, 1978. The said documents were produced in Court.

[6]. In the defendants further amended defence dated 2nd May 2017,

Paragraph 11(a) states,

“The plaintiffs aver that Bungoma SRM 192 of 1987 was filed by his children against the defendant and himself seeking inter alia, recovery of parcel No. W. Bukusu/N. Mateka/85 and 77 but the same was never prosecuted”

That case was attached to the plaintiffs bundle of documents. A perusal of the plaint on paragraph 4 and 5 states;

Paragraph 4,

“In the year 1972, the first defendant purported to purchase land parcel West Bukusu/North Mateksa/77 and 85 measuring seven and 2 acres respectively from the second defendant then the registered proprietor of the suit property”

Paragraph 5,

“The acquisition of the suit property by the 1st defendant was executed by him with the actual or constructive notice that the second defendant held the suit property in trust for the seven sons, the plaintiff herein”

[7]. This suit was filed in the Bungoma Senior Residents Magistrates Court. On 20/8/87. The suit was by

sons of the plaintiff in this suit. The plaintiff is the one who has produced that plaint in this case. He was served by his own children. He must have known in 1987 that his lands W. Bukusu/North Mateka/77 and 85 were registered in the name of the defendant herein. His children knew the plaintiffs land was sold to the defendant herein one Melitus Nyongesa. That is why they made Melitus Nyongesa the first defendant in that suit and their father the plaintiff herein as the second defendant. It cannot be true therefore, that the plaintiff herein learnt of the transfer of his lands W. Bukusu/N. Mateka/77 and 85 in 1994. He knew that on or before August 1987.

[8]. If he thought the transfer was fraudulent, the cause of action then arose on or before August 1987. He had twelve years from then to file suit. The twelve years elapsed on or about August 30th 1999. This suit was not filed until 16th March, 2001. The suit was clearly filed out of time.

[9]. Was there any fraud established" The plaintiff in this case himself states in his evidence that he was approached by the defendant to purchase his land West Bukusu/North Mateka/77 of 8 acres or thereabouts. He states that this was in 1973. He states that he proceeded to give the defendant possession and vacated therefrom. He claims that there was an agreement to get him an equivalent land. He searched and only got a land of four acres. However even in that one and also in a subsequent one the defendant was unable to purchase for him in what he claimed as the agreement. That he requested the plaintiff to leave and vacate his Land West Bukusu/North Mateka/77 and 85 and the defendant refused so to vacate. He claims he purchased one acre with the help of his father in-law and that is where he settled his family. He himself says that the defendant breached the terms of the agreement. He alleges that he was forced by one the defendant and Administration Policemen to sign Land Control forms or the transfer of land forms.

[10]. In the plaintiffs evidence in chief in court he agreed that he vacated the suit land freely. He also agreed that the defendant took possession. The question that begs an answer is, why would he leave and vacate his lands Number 77 and 85 for the plaintiff without any payment or without a concrete agreement for the land for which the alleged exchange was to be made" His allegation that he was forced to sign documents at the Land Control Board was not plausible. At the Land Board, the consent is signed by the Chairman of the board and the consent produced in court is a stamp printed and signed by the Chairman of the Land Control Board Kavujai Land Control Board. This Consent was not challenged by him to Appeals Board established in the Act for that purpose under the Land Control Act. Even when the defendant was charged with forgery contrary to Section 349 of the Penal Code, the only issue raised was the letter of agreement and not the consent. The defendant was later released on appeal in the High Court. There was no way the defendant would forge a consent of the Land Control Board and get away with it if a complaint was made. There is absolutely no evidence that the Consent was fake and/or that it was not granted by the Kivujai Land Control Board. Once a consent of the Land Control Board is granted by the Kivujai Land Control Board, the beneficial interest in the property passes to the purchaser. The signing of the transfer can be signed by the Executive Officer of the Court if the seller is uncooperative.

[11]. The defendant entered the suit lands with the plaintiffs permission. The plaintiff left his own lands W. Bukusu/N. Mateka/77 and 85 of his own free will. These facts are not disputed. The plaintiff alleges that there were supposed to be an exchange that never materialized. The defendant say the land was purchased for cash 3,000 and 2,000 respectively and that he paid and took possession in 1987 to date. The defendants produced an agreement for sale to that effect. Whatever the case, the facts herein to me do not establish a case of fraud at all. What is established by evidence on record is at worst breach of contract. To me, whatever happened between the plaintiff and the defendant, each one of them was aware. Having found that no fraud is established and/or proved, then there was absolutely nothing to prevent time from running. The cause of action having arisen in 1987, this suit was filed out of time without leave of the court. The suit must inevitably be struck out. The defendant had raised this issue in

his defence had the plaintiff conceded the same, courts time would have been saved. I will therefore grant this costs of the suit to the defendants. Suit is struck out with costs to the defendant.

Judgment read in Open court in the presence of Mr. Murunga.

Dated at Bungoma this 22nd day of February, 2018.

S. MUKUNYA

JUDGE.

In the presence of:

Joy: Court Assistant

Mr. Kituyi for the defendant

Mr. Murunga holding brief

Firm of Nalienya Muruka & Co. for the Plaintiff



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