



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: TUNOI & SHAH,J.J.A. & BOSIRE, AG.J.A.

CIVIL APPEAL NO. 125 OF 1997

BETWEEN

MWINYI HAMISI ALI APPELLANT

AND

THE ATTORNEY GENERAL

PHILEMON MWAISAKA WAWAKA RESPONDENTS

(Appeal from a judgment & decree of the High Court of Kenya at Mombasa (Justice Wambilyangah)
dated 18th September, 1995

in

H.C.C.C. NO. 732 OF 1991)

JUDGMENT OF THE COURT

The facts leading to this appeal are somewhat involved. There were initially four parties in the superior court. The appellant was the plaintiff. The Attorney General was the first defendant. Mr. Philemon Mwaisaka Wawaka was the second defendant and the Commissioner of Lands was the third defendant. We will refer to the parties as Mr. Hamisi Ali, the Attorney General, Mr. Mwaisaka and the Commissioner respectively.

Mr. Hamisi Ali was desirous of buying a farm for himself and went and saw one Mr. Dato, an estate agent in Mombasa and asked Mr. Dato to find a farm for him. Mr. Dato introduced Mr. Hamisi Ali to a Captain Townsend who was interested in selling farms he owned. One was L.R. 324/III/MN (324) which was registered in the name of Captain Townsend. The other was L.R. 334/III/MN (334) which was registered in the names of Captain Townsend, a Mrs. Brady, a Mr. Taylor and a Mr. Torr. These four were proprietors as tenants in common of undivided equal share each in the said plot. Captain Townsend informed Mr. Hamisi Ali that he would arrange to get his coowners to agree to sell the plot to him. This never happened. Captain Townsend emigrated to South Africa in about 1965.

Prior to Captain Townsend wishing to sell plot Numbers 324 and 334 to Mr. Hamisi Ali, the then Colonial authorities had asked the leasehold owners thereof to surrender the titles to the Government as the owners had not developed the plots (farms) as stipulated in the leases. The letter of 7th November, 1955 addressed to the said four shows that instead of the Colonial Government forfeiting the title of plots 324 and 334 it (the Government) sought a surrender of titles in exchange for allocation of residential beach plots to them.

The letter of 26th January, 1956 addressed to the Commissioner of Lands by Captain Townsend shows that the Captain surrendered his title document, in respect of plot No. 324, to the Government in consideration of the Government promising to grant to him a smaller residential plot "on the same lines as had been offered to the partners of the adjoining plot No. 334". This letter actually shows that the certificate of title in respect of plot No. 324 was sent to the Commissioner. We will revert to the effect of the surrender of certificate of title, later on, in this judgment.

On 21st March, 1961 the Commissioner wrote to Captain Townsend to the effect that in exchange for surrender of both plot numbers 334 and 324 the Government was to offer two residential beach properties to Captain Townsend and one each to the other three co-owners to plot No. 334. The Commissioner had in his possession the certificate of title to plot No. 324 and had asked M/s Daly & Figgis, Advocates for the leaseholders to send to him (the Commissioner) the certificate of title in respect of plot No. 334.

The issue of formalization of surrender of the two plots in question dragged on for years presumably because the parties emigrated from Kenya and later died. Mrs. Brady died on 3rd January, 1968 in Western Australia; Captain Townsend died on 8th September, 1978 in South Africa. We have not been able to ascertain the date of death of Mr. Taylor. Mr. Torr had died in 1959.

Mr. Hamisi Ali seems to have appreciated that since the title to plot number 324 was surrendered by Captain Townsend to the Government in 1969 he could not claim any right to the said plot. He stopped using plot No. 324 and concentrated on developing plot No. 334. The return to the Government by Captain Townsend of his documents of title in respect of plot No. 324 could only mean that he could no longer sell the property.

The record at the Registry of Titles shows that Mr. Taylor's one-quarter share in plot No. 334 was surrendered to the Government on 19th January, 1970 by the executor of the estate of Mr. Taylor and that the such surrender was registered on 13th January, 1971. The said record also shows that the surrender of the undivided quarter share of Mrs. Brady in plot No. 334 was registered on 23rd May, 1989.

So effectively, as Mr. Gikandi pointed out the Government proceeded to deal with the unidentified portion of plot No. 334 when it was (at least three-quarters of it) private property. Even as at 23rd May, 1989 one-half of plot 334 was, the position on ground not yet having been identified, private property.

It is on the afore-mentioned premises that Mr. Gikandi based his arguments in support of grounds 1, 2, 3, and 4 of the memorandum of appeal in this appeal. Until such time as the land vested in the Government, the Government had no right to alienate the property to any one at all. We would agree with this broad proposition. The issue that then arises for consideration is: Could Mr. Hamisi Ali have acquired a better title to the property? To answer this question the relevant facts become material

. Realizing his predicament Mr. Hamisi Ali wrote to the Minister of Lands seeking his indulgence and sympathy. This he did by his letter of 2nd April, 1985. He had been corresponding with the Office of the Kilifi District Commissioner and Captain Townsend (he said) since 1968 but to no avail. By his letter of 2nd April, 1985 he sought allocation of plots 321 (should read 324) and 334 to him on the grounds that he had lived on the plots for nearly a quarter century, that he had been unable to complete the purchase from Townsend and others; that the plots had been surrendered to the Government. It was a plea of a person in distress; that despite having put so much effort and money in developing the plots he was nowhere near to obtaining title to the said plots.

Of course Mr. Hamisi Ali could then not have known that there was no effective surrender of plot No. 334 (three quarters thereof) to the Government.

The plea of a distressed person was once again repeated by Mr. Hamisi Ali in his letter of 28th November, 1990 addressed to the Kilifi District Commissioner. He was claiming the lands by virtue of his being a squatter thereof. He said, inter alia:

"Please be advised sir, that I had been promised that as a squatter (sic) my case for settlement will be considered by the special commission for the squatters (sic) when land is available for the purpose (copy of letter from the Commissioner of Lands attached Appendix II). Here is the land Sir, which is now available for allocation, but to my surprise and disbelief I find that the land is being allocated to other people and I am not considered at all. Sir, I have stayed on this place nearly half of my life i.e nearly thirty years and I have invested very heavily as can be assessed from the above items. May you please sir, consider my case for allocation sympathetically as I have no other place to go".

As we pointed out earlier that was a plea by a distressed person. He was claiming as a squatter. He was not claiming as an adverse possessor. He started so claiming only just before coming to court.

It would not be out of place here to mention that by his letter of 28th December, 1969 addressed to Mr. Hamisi Ali, Captain Townsend had said that the plot No. 324 was taken over by the Commissioner and that he (Captain Townsend) was in no position to complete the contemplated sale thereof to Mr. Hamisi Ali and Captain Townsend advised Mr. Hamisi Ali to do nothing about the payment until a demand in writing was received from the Lands Department.

It can be seen straight away that Mr. Hamisi Ali was not in adverse possession of the plots in question. He was in possession by virtue of Captain Townsend's consent and somewhat nebulous implied consent of the other three co-owners of plot No. 334. Mr. Hamisi Ali in fact wrote to the Commissioner on 24th February, 1970 requesting that the land (plot 324) be given to him on terms to be agreed. The Commissioner responded to Mr. Ali's letter of 24th February, 1970 by saying that his case would be considered along with that of other squatters at the Coast by the Special Commissioner for Squatters when land was available for that purpose. This land (324) however was allocated to Mr. Mwaisaka Wawaka, the second respondent. Mr. Mwaisaka was, also in addition allocated some 18 acres of land from plot No. 334. The combined plot is now known as MN/III/515. This allocation was done despite the observation by the Kilifi District Commissioner to the effect that Mr. Hamisi Ali had shown a lot of initiative and development in the part he is currently occupying. The Kilifi District Commissioner so observed in his letter of 13th September, 1985 to the Commissioner. This observation by the District Commissioner was based on recommendations made by Kilifi District Land Officer who by his letter of 4th September, 1985, addressed to the Commissioner pointed out that plots Nos. 324 and 334 stood divided into numbers 515 to 527 and that in so doing the fact that Mr. Hamisi Ali was occupying and had developed an unmarked portion of the plots was not considered. He also recommended that Mr. Hamisi Ali be considered for allocation of the land he was occupying which land he had developed.

So far as sympathy is concerned one could be tempted to say that the Commissioner ought to have allotted some of the suit land to Mr. Hamisi Ali. But in a court of law, sympathy takes a second stand. We are governed by statutes. In the superior court Mr. Hamisi Ali was, inter alia, claiming entitlement to land, on the basis that allocation by the Government after the subdivision of the land to Mr. Mwaisaka was irregular, improper, illegal and null and void ab initio. Should that be so, and we are not prepared to say so, Mr. Hamisi Ali had no better title to the suit land than any one else who obtained title by way of allotment by the Government. It can be said that the undivided three-quarter of plot No. 334 was not for the Government to allocate to any one until the same was properly surrendered to it and appropriate surrender documents registered.

The land in question was held under the Registration of Titles Act, Cap 281, Laws of Kenya (the Act). Section 44 of the Act requires that surrender of land leased by the Government to persons be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender. But section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the superior court there can be no doubt that Captain Townsend and his three co-owners had factually surrendered plot No. 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr. Hamisi Ali any title to the suit land. He must claim only as the law allows him to. If, as he says, he was in possession of the suit land, by permission of Captain Townsend and others, he only had mere possession, but no title, or entitlement to title.

There is no doubt in our minds that the Commissioner acted unfairly in not considering Mr. Hamisi Ali as an allottee. To that extent the Commissioner may have been callous, or even partisan, but Mr. Hamisi Ali could not, on that basis alone, claim title. Section 44 of the Act could only be invoked in aid by a registered proprietor and not a person who is there by permission of the registered proprietor. The Commissioner had de facto control of plot No. 334 and if he proceeded, as he did, to allot the land to other persons, who were not aware of the claim by Mr. Hamisi Ali their titles cannot be impugned except as provided for in section 24 of the Act which section has no relevance in this suit.

It is on these observations that, in our view, Mr. Hamisi Ali's claim to title to the suit land fails. The Commissioner or his agents acted irregularly in allotting the plots when they were not de jure surrendered to the Government but such actions were not illegal, or null and void, as we think the surrenders may have been subsequently regularised and as de facto the Government had a right to the suit land. At least Mr. Hamisi Ali had no better right than the Government.

It must be borne in mind that Mr. Hamisi Ali went into occupation of the suit land by permission of Captain Townsend, who had wanted to sell the plots (324 and 334) to him. He paid nothing. He was even told not to pay until such time someone called upon him to pay. He developed the suit lands and has had, presumably, benefits derived from such developments. Mr. Hamisi Ali, in our view, acquired no better rights to claim title to the suit land, as Captain Townsend having surrendered the title of plot No. 324 to the Government was in no position to sell the suit land to Mr. Hamisi Ali who was then on plot 324 at his own sufferance.

Having come to the conclusion we have reached we can only say that Mr. Hamisi Ali was not properly advised on how to go about his claim on adverse possession. Adverse possession can only be claimed against a properly registered owner, that is to say the possession must be adverse to that of the registered proprietor. In this case the registered proprietors were Captain Townsend and the other three persons earlier referred. All of them had died by the time the suit in the superior court was filed. The names of the personal representatives of the said four persons were well within or could with reasonable diligence be within the knowledge of Mr. Hamisi Ali's legal advisers. None of them were made parties to the suit. The claim for adverse possession was, therefore, with respect to Mr. Hamisi Ali's advocates and the learned judge, misconceived. In order that Mr. Hamisi Ali could claim, successfully, title by adverse possession, he had to show that the title of the said four persons stood extinguished. That can only be done if the title holders were parties to the suit. In our view, the learned judge erred when he proceeded to decree title by virtue of adverse possession when the registered proprietors were not parties to the suit. However, the learned judge, quite correctly, concluded that no adverse possession title could enure to the benefit of Mr. Hamisi Ali in respect of plot No. 324 which stood surrendered to the Government since 1971. We are therefore concerned only with plot No. 334 undivided half of which stood surrendered to the Government by the time Mr. Hamisi Ali filed suit in the superior court. No one knows which half of physical portion of plot 334 was not surrendered to the Government. In such a situation it would be futile to speculate on such half physical portion. But nothing turns on that in view of what we have earlier concluded when we said that lack of surrender de jure did not give a better right to Mr. Hamisi Ali.

It is with reluctance that we must disagree with the learned judge when he decreed adverse possession title to Mr. Hamisi Ali of some 18 acres of land which now appears to be known as plot number 1112. The reasons are, as we have pointed out, that, the registered owners or rather their estates are not parties to the suit and it is not clear which geographical portion of plot 334 was surrendered to the Government.

In our view the learned judge was wrong in ordering the transfer of the title to plot 1112 to Mr. Hamisi Ali. There was evidence before the learned judge to the effect that plot 1112 was allocated to a Mr. Mike Maina by the Commissioner. Mr. Maina (whoever he be) was not made a party to the suit. It was injudicious on part of the learned judge to say that Mike Maina, is only a pseudonym. That can only be ascertained if Mr. Maina was made a party to the suit and served with court papers in the suit either personally or through substituted means. As it stands, there was a title document issued to Mike Maina by the Commissioner. That title could only be challenged in the laid down manner and not in the manner that the learned judge did by simply assuming that Mr. Maina did not exist, or he existed per a pseudonym or

that like Mr. Darius Mbela he was not interested in claiming his title or that he was ashamed to be seen as a grabber. There is no evidence whatsoever to justify such drastic findings. Mr. Maina stands 'convicted' without having been heard, a thing no court of law can countenance.

So effectively what the learned judge has done, is to give land allotted to the "legendary" Mr. Mike Maina to Mr. Hamisi Ali. Then there is a further problem. According to an entry made at the Land Titles Registry at Mombasa, Mike Maina had on 14th October, 1991 transferred his right title and interest on plot No. 1112 to a company referred to as Flyover Investments Limited at a consideration of shs. 2,000,000/-. We do not wish to go into the merits or demerits of the title under the Act, of Flyover Investments Limited. The problem manifested itself when the order made in the superior court, ordering transfer of plot 1112 to Mr. Hamisi Ali was not registered by the Senior Registrar of Titles, Mombasa. Although the suit in the superior court was filed on 30th September, 1991 no attempt was made to bring either Mr. Maina or Flyover Investments Limited as parties to the suit.

All in all, in our view, the proceedings in the superior court were conducted in a most lopsided manner. The plaintiff Mr. Hamisi Ali has achieved what may be an empty success. It is a most unsatisfactory state of affairs.

The question that then remains is: what do we do about this appeal? This appeal has caused us a lot of heartache. Whilst we fully sympathise with Mr. Hamisi Ali we cannot make any orders which could give him title to the land he still occupies. But in the absence of any notice of cross-appeal by the respondents we cannot and would not overrule the learned judge. Why no notice of cross-appeal was filed is not for us to go into.

The upshot of all this is that we would dismiss this appeal with costs. It is so ordered. We can only express a pious hope that the Commissioner would deem it fit to allocate some other land elsewhere to Mr. Hamisi Ali.

Dated and delivered at Nairobi this 19th day of September, 1997.

P. K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR