IN THE COURT OF APPEAL

AT KISUMU

(Coram: Omolo, Akiwumi & Tunoi JJ A)

CIVIL APPEAL NO. 134 OF 1993

BETWEEN

ELIUD NYONGESA LUSENAKA.....1ST APPELLANT

ONESMUS MUCHAI WAWERU.....2ND APPELLANT

AND

NATHAN WEKESA OMOCHA.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kakamega (Mr Justice JLA Osiemo) dated 10th March, 1993

in

Civil Case No 123 of 1987)

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JUDGMENT

As far as we are able to make out from the record of appeal before us, the facts constituting the dispute in the superior court against whose decision this appeal is brought were fairly simple and straightforward. Sometime in 1964, Eliud Nyongesa, the 1st appellant herein, was allocated what was then known as plot No 204 at Kamakoiwa Settlement Scheme in Bungoma district. The allocation to the 1st appellant was done by the state corporation known as Settlement Fund Trustees (SFT) and created under section 167 of the Agriculture Act cap 318 of the Laws of Kenya. According to Nathan Wekesa Omocha, the respondent herein, the 1st appellant was unable to pay for the plot which was allocated to him and the 1st appellant asked him (the respondent) to pay the required fees and take over the plot for himself, ie the respondent. The respondent said he did exactly that. He paid to the SFT Shs 302/- as deposit and also paid to the 1st appellant Shs 102/- which the latter had himself paid to the SFT. The respondent said he had lived on the plot from 1964 upto 1987 and as a consequence of that long, open and uninterrupted use, he had acquired title to the plot through the doctrine of adverse possession. The respondent was obviously claiming that his possession was adverse to that of the 1st appellant not the SFT. If SFT had itself brought a claim against the respondent, that claim could not have been defeated by a claim of adverse possession because SFT is shielded from such claims by section 175 of the Agriculture Act which provides:

“Notwithstanding anything to the contrary contained in any law relating to limitation, no suit, application

or proceeding by the Settlement Fund Trustees shall be rejected or dismissed on the ground only that the suit, application or proceeding is barred by limitation under any such law."

In 1987, the respondent brought two suits in respect of plot No 204. The first suit was by way of an originating summons and was filed in the High Court at Eldoret on the 3rd April, 1987. The second suit was by way of a plaint and was filed in the High Court at Kakamega on the 19th June, 1987. In both these cases, the respondent claimed that he had acquired title to the disputed land through adverse possession, that the title of the 1st appellant to the disputed land had thus been extinguished and that he (the respondent) ought to be registered as the owner of the disputed land in place of the 1st appellant. The suit in Eldoret was against the 1st appellant only.

The suit in Kakamega was, however, against the 1st appellant and Onesmus Muchai Waweru Waithanna, the 2nd appellant. How did the 2nd appellant get embroiled in the dispute?

On the 9th April, 1987, the 1st and 2nd appellants entered into an agreement by which the 1st appellant agreed to sell to the 2nd appellant 7.2 hectares out of the original plot No 204 which measured in all 9.2 hectares. On the 9th June, 1986, the SFT transferred plot No 204 to the 1st appellant. On the 8th April, 1987, one day before the agreement of sale between the two appellants, they had applied to the Tongaren Land Control Board to give its consent to the sale agreement and that Board gave its consent on the very same date of the application, namely 8th April, 1987. On the 9th April, 1987, a day after the consent the 2nd appellant was registered as the owner of the 7.2 hectares and his title was given as Bungoma/Kamakoiwa/717. The 1st appellant was also registered as the owner of 2.0 hectares, according to the certificate of title to be found at page 61 of the record. The respondent's claim was that he had acquired title to the whole land. So that when the respondent realised that the 2nd appellant had also acquired some title to the land, he joined the 2nd appellant in his Kakamega suit. On the 25th

May, 1991, the two cases at Eldoret and Kakamega were, by consent consolidated. A word or so about this consolidation. Under order 36 rule 3D of the Civil Procedure Rules a claim for adverse possession, based on section 3 of the Limitation of Actions Act, cap 22, must be brought by way of an originating summons, supported by an affidavit to which must be attached the abstract of title to the disputed land. We take it that by conceding to the consolidation of the two suits, the appellants must have agreed to give up their right to object to the plaint filed in Kakamega case as being incompetent and that plaint was probably swallowed up in the originating summons which is the only legally recognised way of bringing a claim based on adverse possession. We say no more on that point.

The respondent's claim, as we have said, was that he came onto the land through an agreement of sale between him and the 1st appellant. That was way back in 1964. The agreement obviously fell through but the 1st appellant left him to remain on the land until 1987. He built his house or houses on the land, grew coffee on it and was using it openly as his land, and all these with the knowledge of the 1st appellant. He remained there upto 1987 when he instituted his suits.

And what did the 1st appellant say? That he was allowed the land in 1964 by the SFT, that he paid Shs 302/- for it and that the respondent was brought onto the land in 1964 by one Richard Karani who was the then Area Chief. When cross-examined, the first appellant said and we quote him:

"It was the plaintiff [respondent] who used the whole of the said plot before I sold it. Yes, the plaintiff lived and used the said *shamba* since 1964. I did not sell the said plot to the plaintiff in 1964. I had not sued the plaintiff in 1964. I had not sued the plaintiff claiming my said land. .... Yes when the plaintiff was imposed on my plot I complained to the SFT but he was never evicted."

So that on the word of the 1st appellant himself, the respondent was brought to his land against his will in 1964, and the respondent remained there using the whole land upto 1987 when he (1st appellant) sold the land to the 2nd appellant.

On this very clear evidence from the 1st appellant himself, we ask ourselves: What other conclusion was open to the learned judge but that which he reached? We think there was no other reasonable conclusion

open to him except that which he did reach, namely, and we quote him:

"The evidence clearly shows that the plaintiff had been in continuous and uninterrupted possession of the suit

land since 1964 until 1987 when the same was sub-divided. At this time, the plaintiff had acquired title to the suit land by adverse possession since for the last 24 years his possession was open and notorious."

Mr Machio, for the two appellants, asked us whether the respondent's possession was adverse to the SFT or to the 1st appellant. He drew our attention to the provisions of section 41(a)(i) of the Limitation of Actions Act which provides:

"This Act does not –

(a) enable a person to acquire any title to, or any easement over –

(i) Government land or land otherwise enjoyed by the Government;...."

The short answer to that proposition is that land owned by the SFT is not land owned by the Government. Under section 167(1) of the Agriculture Act, the SFT is a body corporate with a perpetual succession and can acquire and own property on its own right and can sue and be sued.

Again as this Court held in *Boniface Oredo v Wabomba Mukile* Civil Appeal No 170 of 1989 (unreported) the interest of the SFT is really that of a chargee. It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property. In this very appeal, when the 1st appellant completed the repayment of the loan on the 9th May, 1986, the SFT signed a discharge of the charge (Exh D5 at pg 65 of the record). The land was then formally transferred to the 1st appellant (Exh D6 at page 65). As the Court pointed out in *Oredo's* case (*supra*) the interest of SFT is further protected by section 175 of the Agriculture Act, which we have already set out herein. We think, the 1st appellant had sufficient title in the land against which the respondent could acquire prescriptive rights through adverse possession and the matter between the 1st appellant and the respondent had nothing to do with the interest of the SFT in the disputed land.

The 2nd appellant claimed his title through the 1st appellant. He (the 2nd appellant) could not have acquired a title better than that of the 1st appellant and the truth of the matter is that the 1st appellant had no title to pass to anyone, his title having been extinguished by the respondent's adverse possession. The learned judge put it this way:

"Therefore by the time the 1st defendant [1st appellant] purportedly applied to have land parcel Bungoma/Kamukuywa/204 sub-divided into two and transferred

one portion to the 2nd defendant [2nd appellant] his title had extinguished. He had lost it to the plaintiff who had already acquired the title by adverse possession. He had nothing to sell and therefore he had transferred nothing to the 2nd defendant."

With respect, we agree. Mr Machio told us the 2nd appellant was an innocent purchaser for value and that we ought not to visit the sins of the 1st appellant upon him. We very much doubt the claim of innocence by the 2nd appellant. While there is really nothing unlawful in applying for and obtaining consent of the Land Control Board in one day and applying for and obtaining registration and title to the land one day after the grant of consent, we cannot help remarking that in the circumstances of this case, the speed with which all these things were done strongly smacks of an attempt to do the respondent out of his acquired rights. We can find no merit in any of the seven grounds of appeal and we order that the appeal be and is hereby dismissed with costs.

Dated and delivered at Kisumu this 1st day of December, 1994.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR