IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: PLATT, GACHUHI & APALOO JJA)

CIVIL APPEAL NO. 27 OF 1986

CHALICHA FARMERS CO-OPERATIVE SOCIETY LIMITED ……APPELLANT

VERSUS

GEORGE ODHIAMBO & 9 OTHERS…….....RESPONDENTS

(Appeal from the High Court at Kakamega, Aganyanya J)

JUDGMENT

The appellant, Chalicha Farmers Co-operative Society Limited, is a cooperative Society consisting of about 150 members. These members had their land compulsorily acquired for Nzoia Sugar Company and were paid compensation by the Government. From their compensation they formed a Co-operative Society which acquired in 1976 farms LR 5775, 8976 and 6687 comprising of 1,513 acres from Settlement Fund Trustee at a cost of Kshs 1,578,800. They occupied it in 1977. When they bought the farm, they found farm employees there. These employees refused to work for the society. At least one of them applied to become a member of the society and paid his fees. The society completed payment for the purchase in 1982. The respondents are some of the employees who were on the farm at the time the society purchased the farm.

The farm has since been sub-divided and each member given a portion. The respondents who are not members of the appellant society were required to vacate the land but resisted. It is alleged that they belong to Wasakhulila Co-operative Society. Because of the disagreement between the appellant society and the respondents, the respondents were collected from the land they were occupying and placed in a camp while they are expected to look for an alternative place. The suit was for their eviction from the camp or entirely from the farm.

The respondent's case is that they have lived on the farm for a long time. They claim that when their employer sold the land to the Settlement Fund Trustee in 1974 there was an agreement between their employer and the Settlement Fund Trustee that they will be given land which they were to pay for gradually. They were not given land. The next thing they saw was the members of the plaintiff Society who told them that they had bought the farm. They had remained on the farm until the time they were collected by the police and placed in a camp.

While this suit was going on an attempt was made to join Wasakhulila Co-operative Society as a party to the suit. Though it is claimed in the defence that the respondents are members of Wasakhulila Co-operative Society and that Wasakhulila acquired interest in the land, it is not clear what purpose would

have been served by the inclusion of Wasakhulila as party since Wasakhulila did not purchase the land or joined with the appellant Society in the purchase of the farm. The respondents are now making an offer that they would like to join the appellant society to become members and pay their fees in order to share the land. This offer is inappropriate since the land has now been shared up including the camp they are now staying in. In the alternative, the respondents claimed in their defence that the matter concerning the dispute was arbitrated upon by officials from the Ministry of Co-operatives and Social Services and ended in giving 913 acres to Wasakhulila Co-operative Society and so their occupation on the land is lawful. There was no counterclaim in their defence claiming this entitlement.

The fact remains that no member of the Ministry of the Co-operative Society gave evidence or any document produced to support the respondent's claim. The respondents cannot be believed in saying that because their overseer joined the plaintiff society they had also joined by proxy. They knew only too well that in joining a Co-operative Society as they had done with Wesakhulila, they had to pay money. They could not have joined the appellant society without paying for their shares.

The learned judge found as a fact, having seen the title deeds produced in court, that the appellants had purchased the farm at the price stated above. It is also undisputed fact that none of the defendants or their families were found occupying L R 5775 when the plaintiffs purchased and took possession of the farm. It is also a further undisputed fact that none of the defendants or their families joined the appellant society as a member.

This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the plaintiff's witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 rule 8 or rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The appearance and defence of defendants (respondents) 1, 2 5 and 7 were prepared and filed by an advocate and if the defences were on the basis of representative action, then the advocate should have stated so. The trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. Judgment should have been entered against defendants 3 to 10. Trial should have proceeded as against defendants one and two. In the light of the findings that the plaintiffs had purchased the farm and taken possession of it, then judgment should have been entered for the plaintiff against defendants 1 and 2. After the trial, the trial judge should have granted the prayers as prayed by the plaintiff. George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice.

The other point of law to be considered is the order made by the trial judge having failed to give judgment for the plaintiff as borne out by the evidence. The trial judge was influenced by the claim made by the defendants that they had lived and stayed on the farm for a long time and that they had acquired a status of squatters.

He stated:

"Apparently, Roffey sold the land to Settlement Fund Trustees who became owners as well as taking over his workers, the defendants included. But somehow, when the Settlement Fund Trustees sold the land to the plaintiff Society no provision appears to have been made for the squatters. Yet it has been the policy of the Kenya Government to make such provision..."

Documents produced herein by Ben Sikolia (PW3) as exhibits 1 to 3 clearly supports this view. Even the defendants agree that the land belongs to the society. In view of this the defendants have no lawful justification to stay there. And the plaintiff's society is justified in seeking their eviction from those

parcels. But in the prevailing circumstances of this case where defendants have been on the disputed land for a long time as squatters and have multiplied in number, it would be unfair and/or unjust to order their eviction from thereat subject to what I am going to say hereafter."

Pausing here for the moment, the learned judge imported into the suit an equitable claim on public policy. These inferences of long stay in the land and the public policy were not pleaded. There was no counter-claim in the defence. This was the learned judge's own creation which is contrary to his specific finding. If the claim of public policy should ever be considered, it should not be directed to the plaintiffs. The plaintiff which is a straightforward purchaser of the farm as a Co-operative Society and without any knowledge of any agreement thereat cannot cater for the defendants who are not members of the society and who, when invited to join or work for the society, took the members of the society as enemies. The agreement to care for the squatters was between the original owner of the farm (Roffey) and the Settlement Fund Trustees who bought the farm for resettlement of the squatters. The Settlement Fund Trustees having bought the farm in 1974 as stated by the respondents, remained with it until 1976 when the Settlement Fund Trustees sold to the appellants. If any breach of the public policy could have been infringed, it was infringed by the Settlement Fund Trustees because, in order to honour the public policy and in furthering of the agreement or the understanding between the original owner and the Settlement Fund Trustees, the Trustees ought to have excised a part of the land for resettling the former employees of the owner before the sale to the appellants. The appellants having bought land from the body charged with the responsibility of resettlement of squatters, the appellants cannot be ordered to do what is outside their means on behalf of the body charged with such responsibility and capable of carrying it out.

Following hereon, the trial judge proceeded to give directives and stated:

"I sympathise with the defendants in this case and while agreeing with plaintiff's claim in law, in principal I feel they should be more human than that. In line with my sympathetic approach, I order that each defendant be allocated 5 acres of the land on plot number 5775, refusal being had to the portion they may occupy on that piece of land. This token would enable them and their families to settle down while looking for more land for cultivation."

As stated earlier, there was no counter-claim filed. However, sympathetic the judge may be towards the defendants, no order can be made (unless by consent) outside the pleading. Two decisions of this court are on this point one in *Captain Harry Gandy v Caspair Air Charters Ltd* (1956) 23 EACA 139 at page 140 Sinclair V P stated:

"The object of pleadings is of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given. As the English Practice Scrutton, L J said in *Blay v Polland and Morris* [1930] 1 KB 628.

"Cases must be decided on the issues on the record, and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course".

This decision was considered in *Bhag Bhari v Mehdi Khan* [1965] EA 94. The order the judge gave is a nullity. It is not one of the prayers asked for by the plaintiffs or the defendant in the absence of a counter-claim.

The respondents can go for the Settlement Fund Trustees and claim land or be settled on any other land by the Trustees. It is only the Trustees who are bound to honour public policy in this case. I would allow this appeal with costs. I would set aside the orders made by the High Court and substitute therefor by entering judgment for the plaintiff as per prayers (a),(b),(c). I would give the respondents three months from the date hereof to vacate the land.

Platt JA. I respectfully agree with the reasoning of Gachuhi, JA. The only point outside that reasoning that can be taken concerns the consequences of the drift of the case, after the representational character of

the defence became apparent. The learned judge, in my opinion, ought to have stopped the case and made sure who was before him, and in what capacity. It could be argued that the whole trial was a nullity, and that it should be retried. That would have the effect of giving the respondent squatters time to defend fully or try and get this or other land to move into.

When this possibility was put to the parties, the appellants agreed to a retrial, but the respondents did not. Their view apparently was that the learned judge in effect treated the respondents George Odhiambo and John Majimbo as representing the others. Translated into legal thought, their case would be that under section 3A of the Civil Procedure Act the trial should be undertaken without technicality and without undue delay. The trial had been held and this court should now pronounce judgment upon the appeal. Each appellant spoke in this appeal, and each one treated the issues as clear in that they had asked George Odhiambo in particular to represent them.

The majority felt that the appeal must proceed without ordering a re-trial. I take it therefore that they imply that what the learned judge did was to accept the respondents, George, John and Wanjala Korofia as representatives in court of all 10 respondents and that the defences of the respondents, George, John, Lulemo Sakwa and Masai Ngeywa would suffice for all the respondents. They had no case in defence and they had pleaded no counter-claim. They were bound to lose, as Gachuhi, JA has concluded. But that is the course the respondents chose, and they must now leave the land they have lived on most of their lives, with the advice that they should seek protection from the Settlement Fund Trustees.

I would like to make two comments: The rules of procedure carry into effect two objectives; the first to translate into practice the rules of Natural Justice, so that there are fair trial; and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within a reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the courts would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of section 3A of the *Civil Procedure Act*. Mr Justice Jackson of the American Supreme Court in *Shaughnessy v United States* 345 UJ 306 (1953) delivered himself of the trenchant observations, that procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws, he thought, might be endured if they are fairly and impartially applied. He suggested that it would be better to live under repressive laws with the common law procedures, than to live under common law with repressive procedures. The point is clear that the common law's insistence on fairness is the goal which the courts expect other organs of Government to achieve, and which by the same token, the courts themselves must achieve.

The second point is that these respondents had in recent years made a number of assumptions that they were being looked after. They were wrong. Their leader, who joined the appellants' Society, did not take them with him. It is not clear how far they could rely on the Wesakhulila Society to help them. Now in court they have assumed that they were represented.

Their presence in court, answerable to themselves, understanding what was happening, putting their best defence forward, was their last chance. Under the rules of Natural Justice, they were entitled to their day in court. They have lost without their rights being demonstrated. But that is only the 10 persons sued.

The order of the court will be that the judgment of the High Court is set aside and there will be substituted therefor, an order that judgment be entered for the appellants/plaintiffs. The respondents/defendants are ordered to move out of the land, but they may have three months from today's date before they are evicted. The appellants will have the costs both here and below.

Apaloo JA. I also agree that this appeal should be allowed and orders be made in terms proposed by Gachuhi, JA. But I have reached my conclusion by a slightly different process of thought. I think, therefore, I must express my thoughts in my own words.

The appellant, which I shall hereafter call the Society, is a Farmer's cooperative duly registered under the Co-operative Society Act. In 1976, it bought the land in dispute from the Settlement Fund Trustees. The Society obtained a title deed and was duly registered as owner thereof.

It entered into possession of the land in 1977 and parceled out distinct portions to its members. The Society found in possession of the land, the respondents. They were apparently workers employed by a previous owner, one Mr Roffey from whom the Settlement Fund Trustees acquired the land. The respondents were invited to join the appellant Society as members or to continue to work for the new members. They declined either invitation. So the Society requested them to vacate the land and give it vacant possession. The respondents refused or neglected to do so. Accordingly, on May 24, 1984, the Society brought this plaint seeking their eviction.

All the respondents were duly served with the plaint, they having been jointly sued. Four of them, namely, the 1st, 2nd, 5th and 7th respondents entered appearance and filed a defence of a sort. The rest did not. When hearing of the suit opened before Aganyanya, J on April 17, 1985, the 1st, 2nd and 3rd respondents were in court. The rest were absent. Apparently, in answer to enquiry from the court, the 1st respondent is recorded to have said:

"We only came 3 people. We are 45 people in the land and we could not all come as the issue is the same for all of us."

Although he did not in terms say, that he was acting on behalf of the others with their authority, the judge seems to have thought so. The judge's apparent view, seems to have been strengthened by the conduct of the 2nd and 3rd respondents. Although invited to cross-examine the chairman of the Society, both declined to do so and said the 1st respondent had already asked "everything on our behalf". When the Society finished its evidence, the 1st respondent testified in a manner which suggests that he was giving evidence not only for himself but also on behalf of the other respondents who were sued. Again, this view is strengthened by the fact that when the 2nd and 3rd respondents who were present in court were invited to make their defences, both said, they adopted what the 1st respondent said. It is to be remembered that the 3rd respondent neither entered appearance nor filed a defence and was technically not entitled to be heard.

Accordingly, the learned judge proceeded to a consideration of this case on the footing that the three present respondents spoke for themselves and the absent respondents. That was the basis on which he held that although the Society had satisfied him that it was the owner of the land and that the respondents have "no lawful justification to stay thereat" he said he would adopt a sympathetic approach and order that the Society allocate 5 acre plot to each of the respondents.

The Society complains that the learned judge arrived at the wrongconclusion and they contest his judgment, broadly, on two main headings, namely (1) procedural and (2) substantive grounds. If I may anticipate my conclusion, the Society was right on both counts. On the first ground, the Society says, (a) as only 4 of the ten defendants entered appearance or filed a defence, and as the Society led evidence of its case which supported the relief sought, the judge should have entered judgment *ex parte* against the six respondents who though served, omitted to enter appearance or file a defence. Secondly, on the purely procedural complaint, the Society says, if the respondents had wanted one person to represent them and find the action on their behalf, they should have complied with the procedure laid down by rule 12 of Order 1 of the Civil Procedure Rules, namely, they should have in writing, authorized the 1st respondent to give evidence on their behalf. As they had not done so, no proper representative defence was set on foot and the learned judge was at fault in dealing with the case as if there had been one.

Before us, all the respondents appeared and told us that as they had a common defence, they in truth authorized the 1st respondent to attend and testify on their behalf. So the only way in which they transgressed rule 12 of Order 1, is that they did not commit their authority to the 1st respondent in writing and filed in court by him. But nobody was prejudiced by this and as a complaint, it was, in my opinion; a barren one. For myself, I would have been sorry, if the blameless appellant Society had been obliged to submit to a re-hearing of this case because of a procedural fault for which they were entirely blameless and which made no impact on the question of substance which fell for decision, namely, whether on the evidence, the Society was entitled, as against the respondents to vacate possession of the suit land. And for my part, I would have thought it the kind of "technicality of procedure" which section 3(2) of the Judicature Act, enjoins us to abjure. Fortunately for justice, the respondents who were in default, object to

a re-hearing and preferred that the appeal be determined on the merits. And so we did. On the merits, the Society proved that it bought the suit land and had vested in itself legal title. This was duly registered and as against the whole world, it is entitled, *prima facie*, to the exclusive possession of the land. The respondents were not its employees or its licencees in any way. The Society asked them to leave but they refused to do so. They did not show that they acquired any sort of title, even an adverse one against the Society and they were, vis-à-vis the Society, trespassers pure and simple. In those circumstances, judgment in its favour for possession was, I should have thought, a foregone one.

Indeed, the learned trial judge himself made the findings which wholly justified the entry of judgment in the Society's favour. He found *inter alia*:

"All the parcels of land mentioned in the plaint are the property of the plaintiff society. Documents produced… clearly support this view. Even the defendants agree that the lands belong to the Society."

The judge then proceeded to hold that:

"In view of this, the defendants have no lawful justification to stay thereat. And the plaintiff society is justified in seeking their eviction from those parcels."

But the learned judge did not accord to the Society what he held to be justly entitled. He said, while he was in agreement with the Society's claim as legally valid, he must adopt what he called, a "sympathetic approach" and taking that so-called sympathetic line, he ordered that the Society should allocate to each of the respondents 5 acres of its land.

In my judgment, that is a wholly indefensible order. A court is governed by principles of law, not the hardship of any individual case. The judge's feeling of sympathy, cannot be an acceptable substitute for the law. There is justice to a plaintiff as well as to a defendant and it would, in my judgment, be an intolerable negation of justice, if a judge were free to inject his own subjective feeling of sympathy for a party in defeasance of his opponent's legally proven right. And the appellant Society, on the judge's own showing, established, as against the respondents, its right to vacant possession of the suit land.

The judge also said it was the policy of the Kenya Government to make provision for squatters in a case like the present and not allow them to be thrown out into the cold. I do not doubt that there may be such a policy and it would be a just and right minded one. But Government policy *perse*, cannot be a determinant of rights or the imposer of liabilities in litigation where such policy is not reflected in legislation. If the protection for squatters is not rested on specific Kenya Government Policy, but on ordinary public policy, namely, the general good of the community as seen from the eyes of judges, then it would, perhaps, be wise to recall the caveat issued on this subject by a celebrated judge that:

"Public policy is an unruly horse, once you get astride it, you do not know where it will carry you."

For my part, I cannot accept that any sound principle of public policy inhibits a court from acceding to the claim of the appellant Society for possession of land which it has proved to be its own against the trespassers and defiant trespassers as the respondents have been shown to be. So, as I have said; I concur in the orders which Gachuhi, JA has proposed and I do so with complete satisfaction.

Dated and Delivered at Nairobi this 6th Day of August, 1987

H.G PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL