REPUBLIC OF KENYA

Kanyiri v Karauini

Court of Appeal, at Nairobi July 12, 1985

Madan, Nyarangi JJA and Gachuhi Ag JA

Civil Appeal No 90 of 1983

(Appeal from the High Court at Nairobi, Chesoni J, Civil Appeal No 370 of 1980)

July 12, 1985, Madan, Nyarangi JJA and Gachuhi Ag JA delivered the following

Judgment.

According to the plaint filed in the resident magistrate's court at Kiambu on August 10, 1976 by the plaintiff (respondent here), and amended on August 24, 1978, the plaintiff asserted that together with his two brothers, both referred to as Mwaniki Karauni, he was the registered proprietor of the land comprised in title number Nyathuna/Kabete/600, of which the defendants (appellants) had been in illegal occupation since first January, 1976.

The plaintiff denied being in illegal "occupation" of the land since January, 1976. The first defendant claimed that he had been in occupation since 1964 having bought the plaintiff's "right and interest" therein from him; that the second and third defendants were lessees of a portion from the third defendant.

Two agreements of sale were produced to the trial court at Kiambu. The first dated December 28, 1969 stated that the plaintiff leased his land No 600 to the first defendant who had given him Kshs 2,364 of which sum someone named Mugera spent Kshs 750, and the plaintiff spent Kshs 1,614; that if the plaintiff wished to have the land back he "shall repay" the money expended by him to the first defendant.

The second agreement of sale was dated August 16, 1968 (the English translation erroneously typed the year 1983).

> ***It stated that "J Karauni Muthaka" sold portion of his land reference 600 to the first defendant which was in the name of the plaintiff for the price of Kshs 1,500 paid in full.***
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> ***The trial magistrate Mr O'Kubasu (as he then was) said in his judgment:- "In this case I am satisfied that the first defendant took possession of the suit premises in 1964 after he had bought out the original owners … The first defendant is not in unlawful occupation of the suit premises … has been in occupation since 1964 … he cannot be considered to have occupied the suit premises unlawfully; it follows (he) cannot be evicted by the plaintiff".***

The plaintiff appealed to Chesoni, J, of the High Court who recorded that it was not in dispute that the land in question is agricultural land, and the provisions of section 6 of the Land Control Act (cap 302) had

not been complied with. The transaction relied upon by the first defendant was therefore void for all purposes and the plaintiff was bound to succeed.

The first defendant is appealing against the decision of Chesoni, J, on the grounds that the learned judge erred in deciding the appeal on a point of law and fact which had not been canvassed in the magistrate's court, namely that the land was controlled under the Land Control Act (cap 302); secondly, there was an agreement to sell the land to the first defendant; thirdly, the third defendant had cultivated the land for over 18 years and "gained a prescriptive title".

The first two grounds of appeal are inter-related. It being agreed that consent of the land board had not been obtained for sale of agricultural land the learned judge was bound to take note and give effect to the provisions of the Land Control Act (cap 302) which makes all transactions without such consent void for all purposes.

No prescriptive rights could have arisen in favour of the first defendant in this case even if he began cultivating the land in 1964 for his claim that he bought the land from the plaintiff, which would be under the two agreements of sale dated 1968 and 1969, confirmed in the second ground of appeal, was inconsistent with a prescriptive right. It was also short of the prescriptive period of twelve years as the plaintiff's suit was filed in 1976. The first defendant also did not claim a prescriptive right either under section 38 of the Limitation of Actions Act (cap 22), or even in the form of a prayer, in his defence.

Mr Simani who appeared on behalf of Mr Hayanga's brief properly conceded that in view of the provisions of section 6 of the Land Control Act (cap 302) the appeal against judgment of the High Court was unarguable.

We were told that under section 7 of the Land Control Act (cap 302) the respondent agrees to pay back the sum of Kshs 2,364 paid to him by the appellant on December 28, 1969, and also that judgment may be entered against him for that sum of money with interest thereon.

Accordingly we enter judgment by consent in favour of the first appellant and against the respondent in the sum of Kshs 2,364 together with interest thereon at 10 per cent per annum from December 28, 1969 until payment on or before December 31, 1985. This our order shall be substituted as the decree in place of the order made by the resident magistrate, and if need be it may be executed as such.

We also order that all three appellants shall vacate the land and hand over possession thereof to the respondent on or before January 31, 1986. Our intention is to give the appellants sufficient time to harvest their crops, and not plant any further.

Each party will pay his own costs.

Orders accordingly.