



Maweu v Kiu Ranching & Farming Cooperative Society Ltd

Court of Appeal, at Nairobi September 4, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Civil Appeal No 2 of 1983

(Appeal from the ruling of the High Court at Nairobi, Porter J)

Cases

1. Mwangi Githu v Livingstone Ndeete & Others, Court of Appeal No 4 of 1979

Referred

2. Tayebali Alibahi v Abdulhussein Alibhai [1938] 5 EACA 1 Followed

3. Gathure v Beverly [1965] EA 514 Referred

Statutes

1. Limitation of Actions Act Cap 22

2. Civil Procedure Rules, Order 6 Rule 13

3. Civil Procedure Rules, Order 35 rules 1 and 2

4. Registered Land Act, (Cap 300) section 30(f)

5. Land Title Acts Cap 282

6. Land Title Court Ordinance, Cap 143, 1926

7. Subsidiary Legislation Cap 282, section 2

8. Registration of Title Act, Cap 281

9. Registration of Title Act, section 23, 36 & 37

10. Land Title Acts section 23

11. Limitation of Ordinance, 1934 section 41

12 Indian Limitation Act

13. Limitation of Actions Act, Cap 22

14. The Land Control Act, Cap 302

Advocates

Mr Mulwa for Respondent

Mr Karuga Wandai for Appellants

September 4, 1985, Hancox JA delivered the following Judgment.

The Respondent Co-operative Society purchased an area of 11,330 acres, comprising Land Reference 7612 at Kiu in the Machakos District, in 1971. The previous owners, Mousley and sons Ltd, had permitted a number of person, who have been referred to by the a compendious term “squatters” to stay on the land and, it seems from the letter written by one of them, Mr Samuel Wambuya Kamuya, dated August 26, 1981, that they, or their forbears, had settled on this land in 1933, before Mousley and Sons Ltd became the owners. Prior to the sale to the Respondent there was some scheme to sell the land to the squatters at Kshs 1,000.00 per family, leaving the individual families to demarcate it amongst themselves, but this foundered due to lack of official, presumably land Control Board, consent. Consent was given to the sale to the Respondent by the Masaku Nonyo Sabuk Divisional Land Control Board on June 10, 1970, subject to its agreement to lease 530 acres to eighteen families for the residue of the 999 year term from February 1, 1946, less three years, so as to gibe a reversion on the head lease to the Respondent. The list of the eighteen “legal”squatters, (presumably the heads of the respective families), a term to which the learned Judge made reference, appears in a letter from the Respondent to its advocates, Messrs, J K Mulwa & Co, dated March 4, 1982. None of the present appellants, with exception, possibly, of Daudi Nzomo, the Sixth Appellant, appears in that list. The “illegal” squatters, including the twenty Appellants, were given sixty days notice to vacate the land, so as to enable the Respondent to carry out development projects, on March 18, 1980. The advocates letter followed over a year later on August 19, 1981. Neither was complied with and, consequently, the plaint claiming an order for vacant possession was filed on September 22, 1981.

However, in the period intervening between the two notices to vacate the Ministry of Cooperative Development and the District Commissioner, Machakos, became involved in the dispute. It seems that 1042 acres were offered to the squatters so as to enable one hundred and forty squatters and their families to live and graze their cattle. I assumed from Mr. Mulwa’s submissions to us o behalf of the Respondent that a further 492 acres were intended to be given to the Appellants, making with the 550 acres allocated to the eighteen families, a total of 1042 acres. I also understood from Mr Mulwa that the one hundred and forty families were separate and distinct from the eighteen families envisaged in the land Control Board Consent.

This is not borne to by the correspondence. In his letter of June 27, 1981, the Provincial Cooperative Officer, Eastern Province, identified the problem as being the refusal of the “illegal” squatters to settle in the 1042 acres allocated, and their desire to settle in any area that they chose within the Ranch. It would even appear from their letter of July 22, 1981, that the squatters were seeking yet more land. Nevertheless, Messrs Karuga Wandai & Co who were then acting for the squatters, accepted the 1042 acres by their letter of July 25, 1981. The correspondence is, unfortunately, not complete, but it would seem that the Ministry and the Administration had between them almost managed to achieve some kind of compromise when Messrs J K Mulwa & Co, sent their notice to vacate on August 19, 1981, containing the following passage:

“This notice takes into account the chief’s notice which expires on May 30, 1981 but the reason for such further notice is that our clients now do not wish to entertain any further requests of whatever nature from your clients. Any promise made to your client is equally abrogated.”

Which would indicate that the negotiations, if any, had broken down.

The defence and counterclaim, seeking, inter alia , an order of transfer to them of the land the Appellants

then occupied was filed on November 2, 1981. The Appellants also claimed therein that they had been in adverse possession of the land since 1933 and were entitled to it under the Limitation of Actions Act, CAP 22. The Respondent, however, filed a Notice of Motion on February 15, 1982, seeking that the defence be struck out as disclosing no reasonable answer to the claim, under order 6 Rule 13 of the Civil Procedure Rules, and summary judgement under Order 35 Rules 1 and 2. The judge (Porter J) allowed both applications, struck out the defence and counterclaim, and entered judgement for the Respondent as prayed.

I am in respectful agreement with Platt Ag JA whose judgement I have had the advantage of reading in draft, that the questions of title to, and adverse possession of, Land are separate and distinct. As the learned Judge in this case correctly appreciated, the Registered Land Act, CAP 300, provides for a just such a situation as this, for in section 30(f) it states that the acquisition of land by a registered proprietor is subject to rights acquired, or in the process of being acquired, by prescription, as an overriding interest. If, therefore, the land in this case was registered land there would have been no difficulty from the squatters' point of view – see Porter J A, with whom the rest of the court agreed, in *Mwangi Githu v Livingstone Ndeete and Others* Civil Appeal 4 of 1979, at page 4 of judgement.

The judge referred to section 21 of the Land Titles Act CAP 282, which provides that every Certificate of Title issued under the Act is conclusive evidence of the matters therein contained. Accordingly the judge held, following *Tayebali Alibhai v Abdulhussein Alibhai* (1938) 5 EACA 1, that any period of adverse possession prior to the acquisition of title to the land by the Respondent was irrelevant for the purpose of the Appellants' case. Section 21 of the Land Titles Court Ordinance, CAP 143 of the 1926 Edition of the Laws of Kenya, under which Alibhai's case was decided was identical to the present section, and the Court of appeal for Eastern Africa in that case held that the registration under that Ordinance was the foundation of the title and that certificates issued there under conferred and absolute and indefeasible title to the property in question. Consequently there could be no entitlement or easement in favour of the respondent in that case, by virtue of the Limitation Ordinance to the staircase, wooden landing and balustrade which overlapped on to the appellants' plot, unless the possession or use of it had existed for the prescribed period after the date of the grant of the certificate of title.

Unfortunately, however the Land Titles Act has no application to the present case LR 7612 is at Kiu in the Machakos District, whereas the Land Titles Act applies only to the areas stated in proclamations issued under section 2, and these are set out at page 43 of the Subsidiary Legislation Cap 282. They cover Mombasa Island and other areas in and near the Coast Province. Why the learned Judge confused this Act with the one immediately preceding it, namely the Registration of Titles Act, Cap 281, is beyond me, since the submissions of counsel in the High Court were directed to the latter Act and showed that the suit was registered thereunder. Possibly the reference to *Alibhai v Alibhai* may have misled the Judge into thinking that the Land Titles Act applied because, of course the premises in that case were at Mombasa. Be that as it may it is an unfortunate mistake which led part to the Appellants being deprived of their right to defend the action. Accordingly the relevant sections for the purposes of a decision in this case are section 23 and 36 of the Registration of Titles Act, and not section 21 of the Land Titles Acts section 23 provides:-

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

Section 36 relates to a memorandum of transfer, and provides:

“If a transfer purports to transfer the whole of the land mentioned in any grant or certificate of title, the registrar may, instead of cancelling the grant or certificate as provided by section 22 and 35, enter in the register and endorse on the grant or certificate a memorandum of the transfer, and deliver the grant or certificate with that memorandum shall be as effectual for the purpose of evidencing title, and for all other

purposes of this Act, as if the grant or old certificate had been cancelled and a new certificate had been issued to the transferee in his own name, and the foregoing process in lieu of cancellation may be repeated upon every transfer of the whole of the land, but when in the opinion of the register any grant or certificate cannot for want of space or other cause conveniently bear any further endorsement, he may require cancellation and the issue of a new certificate.

This, indeed, is the section which was being considered by Miles, J, in *Gathure v Beverly* 1965/EA 514, in which he followed *Alibhail v Alibhai*, but only for the purpose of determining when the period of prescription would begin to run. Since the memorandum of the transfer of land to the Respondent is endorsed on the original grant as entry number, section 36 in the operative provision in this case.

It seems to me that the concepts of a certificate of title issued under the Registration of Titles Act (or the Land Titles Act) and a period of adverse possession are not necessarily mutually exclusive. I doubt whether the Court which decided *Alibhai v Alibhai* would necessarily take the same view today in a dispute over the occupation of land which involves the possibility of squatters' rights thereto. In that case express reference was made by Sir Joseph Sheridan C J to section 41 of the Limitation Ordinance, 1934, which applied the period laid down in the former Indian Limitation Act, which was said to be twenty years. I have been unable to find any provision in that Ordinance corresponding to section 38 of the present Limitation of Actions Act, Cap 22, which provides:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.” Accordingly it is not, in my view, surprising that the former Court of Appeal held that the period of limitation which conferred a possessory right could not prevail against a registered certificate of title granted in 1923. but in the instant case an action based on adverse possession is clearly maintainable, notwithstanding that a certificate of title has been issued, because section 38(1) of that Act, to which Mr Mugo, who now appears for the Appellants referred us, expressly provides that a person claiming to be so entitled may apply to the High Court for an order that he be registered in place of the person then registered as the owner of the land. Since section 38 refers back to section 37, and since the suit and here is registered under the Registration of Titles Act, in section 37, it follows that the Judge should not have held that the defence should be struck out and disclosing no reasonable answer to the plaintiff's claim or that there was no basis for the counterclaim. Section 37 itself reinforces the position by providing that the Limitation of Actions Act (which, of course, includes section 7) shall apply to land registered under the four Acts named therein in the same way as it applies to unregistered land. It goes on to provide that if the title would ordinarily be extinguished under the Limitation Act, it shall not, in the case of registered land, be extinguished, but shall be held in trust for the person who has acquired title as against the registered proprietor.

Had the learned Judge not overlooked the provisions of section 37 and 38 of the Limitation of Actions Act, I have no doubt he would not have taken the course he did with the consequence of entering judgement for the Respondent. Clearly there existed triable issues in this case not the least of which was as to the acreage of the land offered for settlement as the Affidavits and exhibited correspondence filed in the High Court in support of and against the Motion showed moreover there is nothing on the record to show that the Certificate of Title was produced in the High Court. It was the Respondent's obligation to do so and the Judge should not have given summary judgement without calling for it. It was left to us in this Court to call for it and the original grant was produced although we did not see a separate certificate of title, as would appear to be envisaged in Section 22 and FORM C of the First Schedule to the Act.

I would therefore allow the appeal set aside the order of the High Court and direct that the trial should proceed. I draw attention to the fact that under order 36 Rule 3D(1) of the Civil Procedure Rules and application under section 38 should be made by way of originating summons. However, the application for an order of transfer in the instant case was made by way of counterclaim and not by plaint. This point was not argued before us, but it would seem appropriate particularly if evidence has to be led for the issues between the parties to be decided in the present suit, rather than that the Appellants should be put to the express of bringing separate proceedings.

I would award the costs of the appeal and of the proceedings consequent on the Notice of Motion in the High Court to the Appellants in any event. As Nyarangi J A and Platt Ag J A agree, the orders of this Court are as set out herein.

Nyarangi JA. I have had the advantage of reading in draft the judgement of Hancox, J A and that of Platt, Ag J A in agreeing with the two judgements I would add that there was a special condition of approval of sub-division under the consent to the transaction given pursuant to Section 6(1) of The Land Control Act, Cap 302 that the Respondent Cooperative Society would lease 550 acres to 18 families for the residue of the term of 999 years with effect from February 1, 1946 less the last 33 years. However, the Affidavits and the letters exchanged between the representatives of the parties produced before the High Court during the hearing of the Notice of Motion disclosed a divergence of views about the acreage. That was an issue so basic to the litigation that it raised a triable issue and the Appellants should have been allowed to put their case to the High Court.

I agree with the order on costs proposed by Hancox JA.